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HINDU LAW—ADOPTION OF AN ONLY SON.

The validity of the adoption of an only son is one of the points in Hindu Law on which there is a conflict of opinion between the different High Courts in India. There has been a course of decisions in Madras extending over nearly a century in favour of the validity of the adoption.* The High Court of Allahabad has emphatically laid down the same view and has pronounced two Full Bench decisions, *Hanuman Tiwari* v. *Chirai* in I. L. R., 2 A., 164, and *Beni Prasad* v. *Hardai Bibi* in I. L. R., 14 A., 67.

In Bengal the course of decisions in recent years is certainly the other way. But there has been no decision by a Full Bench in that Presidency. It is only necessary to refer to the two leading decisions both by Division Benches of the High Court: *Raja Upendra Lal Roy* v. *Srimati Rani Prasanna Mayi*, B. L. R. A. C. J., 221, and *Manick Chunder Dutt* v. *Bhuggobutty Dossee*, I. L. R., 3 C., 443. In Bombay the later decisions have followed the view taken in Calcutta. The two leading decisions in Bombay are *Lakshmappa* v. *Ramava*, 12 B. H. C. R., 364, and *Waman Raghupati Bova* v. *Krishnaji Kashiraj Bova*, I. L. R., 14 B., 249. The latter is a decision by a Full Bench referring to an earlier unreported decision of a Full Bench and proceeding mainly on the ground of *stare decisis*. The decision of the Full Bench in *Beni Prasad* v. *Hardai Bibi* is by far the ablest and most learned decision upon the point and contains an exhaustive review of all the previous decisions. We do not propose to examine the case-law on the subject, but

* *Vide* Mayne, Ss. 133, 134 and 135 and the cases of *Veera Perumall* v. *Narrain Pillay*, Strange's notes of cases 91, 125; *Arunachallum* v. *Iyasami*, 1 M. decisions 154; *Chinna Gounden* v. *Kumara Gounden*, 1 M. H. C. R., 54; Regular appeal 70 of 1882, Madras High Court; *Narayanasawmy* v. *Kuppusawmy*, I. L. R., 11 M., 43; *Sri Balusu Gurulingaswami* v. *Sri Balusu Rama Lakshmamma*, I. L. R., 18 M., 53.

shall confine ourselves to an examination of the Sanskrit texts and endeavour to ascertain what the correct view is with reference to these texts :—

The texts of *Hindu Law* bearing upon the subject of adoption and more especially upon the adoption of an only son are extremely few. We give below the texts that are of any importance or relevancy :—

I. अपुत्रेण सुतः कार्यो यादृक् तादृक् प्रयत्नतः ।
पिण्डोदक क्रियाहेतोः नामसङ्कीर्त्तनाय च ॥

Manu quoted in the Dattaka Mimamsa.

II. शुक्रशोणितसंभवः पुत्रो मातापितृनिमित्तकः तस्य प्रदानविक्रयपरित्यागेषु मातापितरौ प्रभवतः

नत्वेकं पुत्रं दद्यात् प्रतिगृह्णीयाद्वा स हि सन्तानाय पूर्वेषां नतु स्त्री पुत्रं दद्यात् प्रतिगृह्णीयाद्वान्यत्रानुज्ञानाद्भर्त्तुः ॥ Vasishta.

III. नैकपुत्रेण कर्तव्यं पुत्रदानं कदाचन ।
बहुपुत्रेण कर्त्तव्यं पुत्रदानं प्रयत्नतः ॥ Saunaka.

IV. अपुत्रेणैव कर्त्तव्यः पुत्रप्रतिनिधिः सदा ।
पिण्डोदकक्रियाहेतोर्यस्मात् तस्मात् प्रयत्नतः ॥ Atri.

V. माता भर्त्रनुज्ञया प्रोषिते प्रेते वा भर्त्तरि स्वतन्त्रा पिता वा उभाभ्यां वा सवर्णाय यस्मै दीयते स तस्य दत्तकः पुत्रः यथाह मनुः

माता पितावा दद्यातां यमद्भिः पुत्रमापदि ।
सदृशं प्रीतिसंयुक्तम् ज्ञेयो दत्रिमः सुतः ॥ Manu IX. 168.

आपद्ग्रहणात् अनापदि न देयो दातुरयं प्रतिषेधः तथा एकः पुत्रो न देयः नत्वेकं पुत्रं दद्यात्प्रतिगृह्णीयादिति वसिष्ठस्मरणात् तथा अनेकपुत्रसद्भावेऽपि ज्येष्ठो न देयः ज्येष्ठेन जातमात्रेण पुत्रीभवति मानवः इति तस्यैव पुत्रकार्यकरणे मुख्यत्वात्.

Mitakshara, ch. I. S. 11, pl. 9 to 12.

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I. By a sonless person should some kind of son be anxiously made for the sake of funeral oblations, libations of water and obsequial rites, as well as the celebrity of his name—cited as a text of Manu in the Dattaka Mimamsa.

II. Man formed of *uterine* blood and virile seed proceeds from his mother and his father (as an effect) from its cause. (Therefore) the father and the mother have power to give, to sell and abandon their (son). But let him not give or receive (in adoption) an only son. For he (must remain) to continue the line of the ancestors. Let a woman neither give nor receive a son except with her husband's permission—Vasishta, Chapter 15, verses 6 to 10.

III. By a man having an only son the gift of a son should never be made. By a man having several sons the gift of a son should be made with effort.—Saunaka.

IV. By a sonless person only should a substitute of a son be always anxiously made for the sake of funeral oblation, libations of water and obsequial rites—Atri.

V. He who is given by his mother with her husband's permission while her husband is absent, or after husband's decease or who is given by his father, or by both, being of the same class with the person to whom he is given, becomes his *dattaka* son. Thus Manu says: "He who is equal (by caste) and whom his mother or father affectionately gives (confirming the gift) with (a libation of) water in times of distress (to a man) as his son must be considered as an adopted son." By specifying distress it is intimated that the son should not be given, unless there be distress. This prohibition regards the giver. So an only son should not be given, for Vasishta ordains, "Let no man give or accept an only son"; nor though many sons exist, should an eldest son be given; for he chiefly fulfills the office of a son, as is shown in the following text: "By the eldest son as soon as born, a man becomes the father of male issue."—Mitakshara, Chapter 1, section 11, placita 9 to 12.

The whole controversy upon the subject of adoption of an only son turns upon the principles to be deduced from these texts, and upon the weight to be attached to the interpretation of these texts by the authors of the Dattaka Mimamsa and the Dattaka Chandrika. The question has been thoroughly discussed by the late Mr. V. N. Mandlik in his Hindu Law, pages 496 to 508, and by Mr. Golap Chandra Sirkar Sastri in his Tagore Lectures on

Adoption, pages 283 *et seq.*, and by BHATTACHARJEE in his Commentaries on Hindu Law, 2nd Edition, pages 172 to 182. The first two writers contend in favour of the validity of the adoption of an only son, while the other contends for the opposite view. The views of MR. MANDLIK have been approved and adopted by the Full Bench of the Allahabad High Court. MR. BHATTACHARJEE discusses the question from the point of view of Hindu exegetics and that, no doubt, is the correct method of approaching the question. See *Beni Prasad* v. *Hardai Bibi*, I. L. R., 14 A., pages 70 to 72. We are prepared to show that, even according to the most approved principles of interpretation laid down by Jaimini in his Purva Mimamsa, the view taken by MR. BHATTACHARJEE is not correct. But, before stating our arguments based upon the Hindu canons of interpretation, we may be allowed to refer briefly to some of the arguments that find favour with our courts.

1. With regard to the text of Saunaka, it is obvious that the latter half of the sloka cannot be regarded as imperative. No court has ever laid it down as an imperative duty that a man having many sons should give them in adoption. It is reasonable to hold that when the author uses the same word *karthavya* (should be done) in the first part of the sloka, he intends it to be taken in the same sense.

2. The absence of any penalty in the shape of *prayaschittam* (or expiatory rites) in the case of a person who makes a gift of an only son suggests that it cannot be imperative.

3. There are other texts of Saunaka on the subject of adoption quoted in MR. MANDLIK'S Vyavahara Mayuka, Part I, page 40, and summarised in page 498 of his book. The second and third rules given in these texts have been held to be only directory. It has been held that a Brahmin is not bound to adopt from amongst his *sapindas*. The language of the prohibition, however, is exactly the same. With regard to the fourth rule that an adoption should be made from among the respective castes and not from elsewhere, it has been stated that such an adopted son is entitled only to maintenance, but that the adoption stands.(1) The fact that there is no such penalty attached to the adoption of an only son shows that it is purely recommendatory.

(1) Dattaka Mimamsa, page 18, lines 17 to 20, Calcutta edition. Stokes' Hindu Law Books, page 571.

4. Notwithstanding the alleged imperative character of the prohibition, the author of the Dattaka Mimamsa has allowed an exception to the rule in the case of a *Dvyamushyayana* son.(1) If the adoption of an only son by an uncle is permitted, because there is no fear of extinction of lineage, it must follow that an only son may be given in adoption, whenever there is no such fear. The parents may avert the extinction of their lineage by begetting another son or adopting a son, or they may secure their salvation by one of the numerous ways prescribed for discharging the debt to the manes.(2)

5. MR. MANDLIK has cited several instances from the Vedas and Puranas of the adoption of an only son. It may also be pointed out that there is no text declaring that the adoption of an only son, if it has taken place, is invalid.

6. It has been nowhere laid down that an only son taken in adoption is disqualified for inheritance.

We shall now proceed to state the principles of interpretation to be applied to the solution of the question according to the Purva Mimamsa.

7. In deciding whether a precept of the Sastras is directory or mandatory, the principal test to be applied is whether the advantage or disadvantage to flow from the observance or non-observance of the precept is one of an obvious or visible (in Sanskrit, *drishta*) character or not. If the advantage or disadvantage is obvious, there is no reason for suggesting or presuming any advantage or disadvantage that is not of an obvious character, *i.e.*, a spiritual or invisible advantage or disadvantage. Where there is no obvious reason for a precept, it is the duty of a person who has to construe the text to assume that there must have been some reason for the precept, though it may not be obvious to him. The reason which is thus ascribed for the rule is that some advantage or disadvantage of a spiritual character must follow the violation of the precept. The spiritual result which is thus supposed to ensue is called by Sanskrit writers "*Adrishtaphalam*" (*literally* an invisible result). Where the consequence is not visible or obvious, and an invisible consequence has to be attributed, it is held that non-compliance

(1) See Stokes's Hindu Law Books, pages 554 & 555.

(2) See Mandlik, pages 456 & 457.

must detract from the spiritual or religious character of the act and must render it invalid. If, on the other hand, the consequence of a violation of the precept is visible or obvious, it is the only result which flows from the violation, and it is regarded as not affecting the essence of the transaction. At first sight, this principle may appear strange to English ears, but an illustration will make it clear. In prescribing the qualifications of persons for marriage, Manu has the following:—

(4) "Having bathed with the permission of his teacher and performed according to the rule the *Samavarthana* (the rite on returning home) a twice-born man shall marry a wife of equal caste who is endowed with auspicious (bodily) marks.

(5) A (damsel) who is neither a *sapinda* on the mother's side nor belongs to the same family on the father's side is recommended to twice-born men for wedlock and conjugal union.

(6) In connecting himself with a wife, let him carefully avoid the ten following families, be they ever so great or rich in kine, horses, sheep, grain or (other) property.

(7) (*Viz*) one which neglects the sacred rites, one in which no male children (are born), one in which the Veda is not studied, one (the members of) which have thick hair on the body, those which are subject to hemorrhoids, phthisis, *weakness of digestion*, epilepsy or white and black leprosy.

(8) Let him not marry a maiden (with) reddish (hair), nor one who has a redundant member, nor one who is sickly, nor one either with no hair (on the body) or too much, nor one who is garrulous or has red (eyes).

(9) Nor one named after a constellation, a tree, or a river, nor one bearing the name of a low caste, or of a mountain, nor one named after a bird, a snake, or a slave, nor one whose name inspires terror.

(10) Let him wed a female free from bodily defects, who has an agreeable name, the (graceful) gait of a *hamsa* (swan) or of an elephant, a moderate (quantity of) hair on the body and on the head, small teeth and soft limbs.

(11) But a prudent man should not marry (a maiden) who has no brother, nor one whose father is not known through fear, lest (in the former case she be made) an appointed daughter (and in the latter) lest (he should commit) sin.

(12) For the first marriage of twice-born men (wives of equal caste are recommended, but for those who through desire proceed (to marry again), the following females, (chosen) according to the direct order (of the castes) are most approved."(1)

The question to be considered is whether the absence of any of these qualifications would render the marriage null and void, and if so, what the qualifications thus regarded as essential are and how they are to be distinguished from the unessential qualifications. It may be taken as settled that, both according to the commentators and our courts, except the qualifications relating to consanguinity and prohibited degrees laid down in verse 5, none of the other qualifications is essential. It is noteworthy that the language of verse 5 is not the language of command and that the language of verses 4, 6, 7, 8, 9, 10 and 11 is imperative. This shows that Hindu writers do not determine the imperativeness or otherwise of a precept merely by reference to the grammatical form. Can it be said that marriage with a sickly or garrulous girl is null and void, because a man is commanded not to marry her? The answer to these questions is furnished by the commentators in the commentary to verse 11. We shall refer on this point to the commentary of Kulluka Bhatta, the commentator best known to English writers and to the commentary of Medhathithi, the oldest and most celebrated commentator on Manu.(2) This is what Medhathithi says on the point in his commentary on verse 11. "In this chapter (or in this context), where the prohibition does not refer to any (advantage or disadvantage) that is *visible* (or *obvious*) as in the sloka relating to one who is not a *sapinda,* in the event of a transgression of the rule, the very essence of marriage is wanting, or there is no marriage at all. Hence marriage with a person who is related as a *sagotra,* &c., even if it has taken place, is to be regarded as null and void owing to the violation of the rule, as marriage, like *Adhana* (the kindling of the sacred fire) is based upon the texts of the Sastras.

(1) See Manu, Ch. 3, verses 4 to 12.

(2) See Dr. Jolly's Hindu Law, pages 9 & 10.

As in the ceremony of *Adhana*, in the event of any portion being omitted from ignorance, the sacred fires called *Ahavaniya*, &c., cannot be held to be generated, so also in the case of the marriage of a girl belonging to the same *gotra*, &c., the status of a wife does not arise. Though she might have gone through the form of the marriage sacrament, she is directed to be abandoned. The venerable Vasishta and others have also laid down a *prayaschittam* for a marriage of that kind Though the act (or ceremony) may be *incomplete* owing to the violation of a negative injunction which forms part of it (the ceremony), there is no real blame attaching to the man. Still the *prayaschittam* is expressly ordained by a text. Or, intercourse with a woman of the same *gotra* being forbidden, the *prayaschittam* which has been prescribed may apply to any attempt at such intercourse. The prohibition of families that have neglected sacred rites, &c., being based on *obvious* reasons, the marriage is *complete* (notwithstanding the violation of the prohibition), and the girl married becomes the wife, and she is not to be abandoned; and hence it is that the objections in regard to great families, &c., are dealt with separately from the preceding prohibition and enumerated for the purpose of censure. The practice of virtuous men is in accordance with what has been stated. Men sometimes marry girls with reddish hair but never a *sagotra*."

KULLUKA BHATTA says in this connection: "If a marriage takes place with a girl who is a *sagotra* or with a girl who is a *sapinda* of the mother, the status of wife does not arise, as the word *bharya* like the word *āhavaniya*, &c., implies a sacrament, as the abandonment of such a girl is prescribed by the text that if a man marries a *sagotra* girl from ignorance, he should maintain her like a mother, and as there is a *prayaschittam* prescribed for marriage with a *sagotra*. Whatever injunctions, positive or negative, have their origin in some advantage or disadvantage that is *obvious* or *visible*, as in reference to a family that has neglected sacred rites, (verse 7) the status of wife is not prevented from arising by a violation of that injunction. Hence it is that Manu has separately grouped together the disqualifications mentioned in verse 6. The prohibition relating to girls bearing the names of stars, trees and rivers, &c., which is treated in the middle, does not also prevent the status of a wife from arising; but in consequence of the transgres-

sion of the Sastra, there is merely a *prayaschittam* (to be performed)."

There are injunctions of a similar kind in regard to marriage laid down by Yajnavalkya.(1) MANDLIK's *Hindu Law*, pages 167 and 168. The author of the Mitakshara in commenting on the first hemistich of sloka 53 says "the status of wife does not arise in marriage with girls who are *sapindas* or belong to the same *gotra* or *pravara*. In marriage with girls who are suffering from incurable disease, &c., while the status of wife is created, there is merely the practical inconvenience of disregarding an obvious disadvantage."

The principle of construction which we have thus mentioned and illustrated above is laid down by Jaimini in his Purva Mimamsa I, (iii), 4.(2) The same subject is also dealt with by the great Madhava Charya in his Jaiminia-Nyaya-Mala in Adhyaya I, Pada iii, Adhikarana 3. The literal translation of the aphorism of Jaimini is "From the indication of a reason."(3) The title of the Adhikarana in Madhava's book is *Drishta-moolaka-smriti-appramanyam*, *i.e.*, the non-obligatory character of *smriti* texts which have their origin in *Drishtam*, *i.e.*, visible or obvious considerations. The illustration of this principle given by Madhava Charya is drawn from the text of the *smriti* that the *Adhvaryu* or sacrificial priest takes the cloth prescribed in the *Visarjana homa*. The question considered is whether the text is obligatory. It is first argued that there being no text of the *sruti* contrary to this text, this text must be assumed to be binding and that a text of the *sruti* should be implied or assumed. It is one of the fundamental principles of construing *smritis* that if they are not supported by an express text of the *sruti*, a text must be assumed to have existed and lost through forgetfulness or otherwise. But this assumption is necessary only when there is no reason assigned by the author of the *smriti*. The respect due to a Smriti writer obliges us to assume that if he has not given a reason for a rule, he must have found the reason in some text of the *sruti* not now extant; but if some reason is given by the *smriti* writer for his rule, it is a sufficient recommendation for the rule and in the absence of any Vedic

(1) Yajnavalkya, Book 1, verses 52 to 55.

(2) See Mimamsa Darsana Jivananda's Edn., pages 73 and 74.

(3) See Anandasrama Series, vol. 24, page 29.

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text, it is unnecessary and improper to assume one. The text about the priest taking the cloth is regarded as having originated merely from the cupidity of the priests and the text is, therefore, regarded as not binding. If, therefore, in a sacrifice the cloth is not given to, or taken by, the priest, the sacrifice is not rendered incomplete on that account. Wherever a *smriti* text is unsupported by an express text of the *sruti* or by a text of the *sruti* implied under circumstances warranting it, the text of the *smriti* is regarded merely as laying down a directory precept.

To apply this rule in the present case, there is an obvious reason given for the prohibition of the adoption of an only son. Vasishta says distinctly that the object of the prohibition is the perpetuation of the giver's lineage. The penalty annexed to the prohibition is merely the loss of the obvious advantage of perpetuation of lineage. No invisible consequence need be attributed and the prohibition may, therefore, be regarded as merely directory. An adoption may have spiritual results, but it does not follow that a prohibition of certain persons as subjects of adoption should also be based on spiritual considerations. An adoption may secure temporal and spiritual advantages, but the prohibition may be made only with the object of averting a temporal or obvious disadvantage.

It is argued by MR. BHATTACHARJEE that there is an analogy between the rules relating to the *yupa* or sacrificial post and an adopted son, and that just as a sacrificial post cannot be made of any other wood than that prescribed, so also an adoption cannot be made of any person other than those prescribed. This argument is founded upon the assumption of an analogy between the two cases which really does not exist. If an adoption were purely the creature of rules of religion, it might be said that an adoption which did not conform to any one of the requirements would be invalid. But neither adoption, nor the power to make or give in adoption can be said to be purely derived from religious injunctions alone. Adoption is at least as much a secular institution as a religious one, and there are obvious reasons for commending it from a wordly point of view.(1) That a man has got a *natural right* to dispose of his son in adoption is expressly laid down in the very passage of Vasishta which contains the prohibition against the adoption of an

(1) See Mayne (5th Edn.) Sec. 95 and the texts quoted therein.

only son. It is, in fact, one of the incidents of the *patria potestas* which obtained in India as much as in Rome and elsewhere. If a man has a natural right to *give* his son in adoption, it would seem to follow that the natural right of a man to *adopt* must be still more undoubted. The various instances given by MR. MAYNE in section 95 of his book clearly shew that adoption has been practised in various communities from wordly motives. Granting the existence of the natural craving of most men for children and for male children in particular, and the capacity of a person to make a gift of property of which he is the owner, it follows that a sonless person would be naturally inclined to adopt and bring up a son and make him successor to his property. MR. BHATTACHARJEE is right in stating that the correct solution of the question depends upon whether the right to adopt is based on texts or natural rights. If, as we have shown, the right to adopt or give in adoption is a natural right, the foundation for MR. BHATTACHARJEE's argument admittedly fails.

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It is then contended by MR. BHATTACHARJEE that the rule about an only son is a *Paryudasa* and not a *Pratishedha* and that it must be, therefore, regarded as imperative. In order to appreciate this contention and deal with it, it is necessary to understand what is meant by *Paryudasa* and *Pratishedha* and why a distinction is drawn between the two. The negative particle in Sanskrit may have two meanings. It may be used to express a prohibition or an exception. A *Pratishedha* is a prohibition or negative injunction. A *Paryudasa* is a negative proposition by way of exception to a positive rule of greater generality. The negative proposition is read with the positive rule and qualifies it. In a *Paryudasa* the negative particle is read not with the verb, but with the subject or the object. An illustration will make this clear. Suppose that there is a general rule that 'a sonless man shall adopt a son' and that there is a negative rule that a man shall not adopt an only son. It is possible to take the negative rule by itself and treat it as a *Pratishedha* or to read it as an exception to the positive rule and construct a single sentence, *viz.*, that a sonless person shall adopt one who is not-an-only-son. The practical difference between the two readings according to the rules of Mimamsa would be this. If we read it as a single sentence as above indicated, the exception becomes part and

parcel of the positive rule requiring adoption and this rule prescribes the adoption only of persons who are not-only-sons. It would, therefore, be held that an only son is unfit for adoption. On the other hand, if you treat the negative rule as a prohibition by itself or a *Pratishedha*, the unfitness of an only son not being indicated in the general positive rule requiring adoption, the question of the mandatory character of the prohibition will remain to be decided by other considerations such as those we have already adverted to above. At first sight it may seem strange that a clause by way of exception should be held to be a stronger prohibition than an express prohibition. But the remarks we have made above must have made the matter clear. The subject of *Paryudasa* is discussed in Madhava's Jaiminiya-Nyaya-Mala, Adhyaya X, Pada VIII, Adhikarana 1 (Anandasrama series, vol. 24, page 599, 600); Jaimini X, (VIII), 1-4. The advantage in treating a clause as a *Paryudasa* is that it enables you to treat that and the positive rule as one sentence and one rule; and economy is a great merit in a Sastra. Another advantage is that if the two sentences were read apart, the positive rule must be held to be incorrect to the extent of the ground covered by the negative clause. Instead of reading the two sentences separately and attributing a partial incorrectness or partial failure of application to the positive general rule, it is preferable and proper to read them together. These are the considerations in favor of viewing a rule as a *Paryudasa*. But these considerations may give way before weightier ones and the Sanskrit writers were never so rash as to lay down that these considerations should in all cases lead us to conclude that a rule is a *Paryudasa*. Whether there are other reasons which tell against the construction of a rule as a *Paryudasa* depends on the circumstances of each case. Now let us take the text of Saunaka first. It is the first hemistich of the text that relates to an only son. This half of the text states that "by a person having an only son, the gift of a son should never be made." The positive general rule to which alone this can be read as a *Paryudasa* must be that 'a father should give his son in adoption.' In the first place there is no such rule in existence compelling a father to give his son in adoption. This of itself is a complete answer to the argument. But assume for the moment that there is such a general rule. What would be the consequence of reading the negative rule as a *Paryudasa?* The resultant rule

which would be expressed in a single sentence would be, a father having more sons than one shall give his son in adoption. If this is the subject, does not the 2nd hemistich becomes mere surplusage? Surplusage is always to be avoided in the construction of a text.

Let us now take the text of Vasishta. Here the first rule that 'a man shall not give an only son in adoption' cannot be a *Paryudasa* for the reason already mentioned that there is no general rule compelling a man to give his sons in adoption. It is the latter part of the text "A man shall not *take* an only son in adoption" that can be possibly said to be a *Paryudasa*, as it may be alleged that there is a general rule that a sonless person shall take a son in adoption. There is, however, no such general rule laid down obliging a sonless person to adopt. The Dattaka Mimamsa quotes a text of Manu to that effect, but it is not to be found in the editions of Manu now extant. The text of Atri quoted above is intended merely to prevent persons having sons already from taking a son in adoption. The rule which would result from the construction of a single sentence out of the negative rule and the positive rule would be, 'a sonless person shall adopt one who is not-an-only-son.' If this construction is adopted, the whole passage becomes un-grammatical. The reason given by Vasishta is "For *he* is for the perpetuation of lineage." The antecedent of *he is only-son*, but in the unified sentence above constructed, this antecedent cannot be found. You have to pick out this antecedent by breaking up the object in the sentence, a course which is altogether un-grammatical and not permissible.

We shall now state what our own construction of these texts is. These texts of Vasishta that a man shall not give an only son in adoption and that a man shall not take an only son in adoption are only rules of *Pratishedha* or prohibition, framed for the purpose of averting a visible temporal disadvantage, and no more. It must be noted that these texts do not declare the incapacity of an only son to be adopted. If the object of the text was to declare the unfitness of an only son, the purpose would be completely attained by prohibiting either the gift or the acceptance alone. Since what is incapable of being the subject of a gift is incapable of being the subject of acceptance also. But according to our view the separate prohibition of the gift and the acceptance can be easily

explained. It is for the purpose of indicating that blame attaches to the giver and the receiver and not for the purpose of declaring the unfitness of the subject of the gift. It cannot be said that the attachment of blame to the giver necessarily carries with it the attachment of blame to the receiver also. Among Hindus especially the idea is very familiar, that what may be blamable in a receiver is not so as regards the giver and *vice versâ;* and it may be said that this difference in respect of the claim to moral approbation between the giver and the receiver is not foreign to English ideas also. An Englishman, for instance, would certainly not consider it meritorious to beg, while he might consider the gift of alms to be meritorious. On the other hand, numerous instances can be given from the Hindu Sastras of a gift being considered meritorious, while the acceptance is condemned.

In the text of Saunaka, the first half should be treated as a *Pratisheda* and the second half as an *Anuvada* (or mere statement of fact). It would be absurd to hold that it is a *Vidhi* (or obligatory precept) that a man having more sons than one should give his son in adoption. It must, therefore, be held to be only an *Anuvada.* It is argued by Mr. BHATTACHARJEE that if it is open to a man to adopt an only son or not as he pleased, and if the right to adopt exists by nature, no rule of law is required to give such option. But the object of such a rule is not to create an option, but to denote some amount of blame in the act.

The construction we have placed upon the above texts is the one which has been adopted by the author of the Mitakshara in dealing with the subject. The author of the Mitakshara distinctly says that the prohibition in the absence of distress regards the giver alone, thereby implying that it does not affect the taker. Vijnanesvara then says, 'An only son should not be given.' Vijnanesvara does not prohibit the acceptance of an only son, unless it be said that such a prohibition is implied in the prohibition of the gift. The use of the word '*tatha*' or similarly, shows that in the author's opinion, the prohibition as to an only son stood on the same footing as a prohibition of the gift of a son otherwise than in distress. Just as in the latter case the prohibition relates to the giver only, or even if it is supposed to affect the taker also, *does not affect the validity of the gift,* so also in the case of an only son, the

validity of the gift is not affected, whatever blame may attach to the giver or to the taker. And this view is supported by the Vyavahara-Mayukha. See Mandlik's Hindu Law, page 503.

There is no analogy between the rule prohibiting adoption by a woman without authority from her husband and the rule relating to an only son. In the former case the prohibition is mandatory, for two reasons, (1) that no reason is assigned for the prohibition, and (2) that the reason, if any, to be gathered *ab extra*, being the want of independence in women, it is a question of *capacity*. A defect of capacity to give or to take is a fundamental defect and must necessarily render the gift null and void.

We may notice here a passage in Dattaka Mimamsa which has been the subject of misconstruction owing to the mistranslation of MR. SUTHERLAND. In Dattaka Mimamsa (IV, 4) the author says that the *sin* of extinction of lineage is incurred both by the giver and the taker. What the author means is only that the taker incurs the sin of causing the extinction of the giver's lineage and not that the taker's lineage becomes extinct notwithstanding the adoption. The text of Vasishta merely says, "For he is for the perpetuation of lineage." Vasishta does not say that the taker's lineage becomes extinct. While the giver incurs the sin of extinguishing his own lineage, the taker would be guilty only of abetment of this sin. Again the word used by Nanda Pandita, viz., *Pratyavaya*, which means only sin, has been wrongly rendered by MR. SUTHERLAND into *offence*. This mistranslation, however, has led Judges (including that eminent Judge, the late Dwarkanath Mitter, J., who was a lawyer without Sanskrit) into holding that as regards the taker, the primary object of the adoption fails, as his lineage becomes extinct notwithstanding the adoption. *Raja Upendra Lal Roy* v. *Srimati Rani Prasanna Mayi.* (1 B. L. R., A. C. J. 221).

13. We shall now pass on to the views of recent commentators on Hindu Law. It may at once be stated that Jagannatha, the author of Colebrooke's Digest and Srinatha Bhatta, the author of the Dattakanirnaya, both regard the gift as valid.

The Dattaka Mimamsa and the Dattaka Chandrika are both said to be against the validity of the adoption. Assuming that these works treat the *gift* as invalid, which, as a matter of fact,

they do not, the weight to be attached to the opinions of these writers is discussed at great length in the Allahabad Full Bench case in the judgments of *Edge*, C. J., and *Knox*, J., and in the judgment of *Edge*, C. J., in *Bhagwan Singh* v. *Bhagwan Singh*, I. L. R., 17 Allahabadpage, 294, and is found to be small. Very strong reasons have been adduced by Mr. Golap Chandra Sarkar for holding the Dattaka Chandrika to be a recent forgery. (See his new book on Hindu Law, pages 77 to 79). The views of the Dattaka Mimamsa and the Dattaka Chandrika cannot, after these decisions, be held entitled to weight; except so far as they may be consistent with sound principles of reasoning. See also *Dr. Jolly's Hindu Law*, page 166, and *Bhagwan Singh* v. *Bhagwan Singh*, I. L. R., 17, A. 373. As to the leading decisions in Calcutta and Bombay to which we have referred, they have been thoroughly criticised by, *Edge*, C. J., in the case in 14 Allahabad and it is unnecessary to go over that ground. As to the views of English writers on Hindu Law, they have also been referred to, at length, in the case in 14 Allahabad, and in MANDLIK's Hindu Law, pages 505 to 508. It is only necessary to bear in mind that the views of English writers upon the subject are entitled to no intrinsic authority and except to the extent that their reasoning is correct, their conclusions possess no value.

SUBSTANTIAL JUSTICE—DISCRETION OF COURTS.

It would be a truism to say that the civil courts in their task of dispensing justice are confined to the law; that if a judge's notions of right and wrong or of the justice of a particular dispute conflict with the rule which the law of the country has laid down for the case, he is bound sternly to carry out the mandates of the law, that is, the justice which the courts are to administer should be found within the four corners of the positive law, written or unwritten, and the hardest case is no justification for not enforcing the law. Yet there are many cases where the judges say that in the exercise of their discretion they decline to interfere, because in their opinion there has been no failure of "substantial justice." This is a position so often taken up that we propose to examine it a little minutely. There is no doubt that the court is invested with a large amount of discretion in many cases; there are

some reliefs which the court is not bound to grant in all cases when a particular legal right is infringed. Now what does this mean? Simply this—that the considerations which should determine the granting of such reliefs vary so much, or that it is so difficult to state them in precise language that it is on the whole well not to seek to lay down a hard and fast rule in such cases. It does not mean that in such cases the judge is entitled to neglect or ignore the legal rights of the parties, and to try to find out the moral merits of their quarrel. Thus the granting of specific performance of a contract is discretionary, but nobody imagines that a judge may refuse specific performance because he imagines that it will be hard on the defendant, say, to compel him to part with the property which he agreed to convey, or that the plaintiff may well do without it. The judge is entitled to take into consideration *certain* circumstances which would be no defence to an action for damages for breach of contract. Thus inadequacy of consideration is no ground for refusing damages for breach of a contract, but specific performance may be refused if the inadequacy is so great as to be evidence of fraud, though no fraud may be actually established; or again in consequence of the plaintiff's delay in seeking specific performance, third parties may have acquired rights in the property which makes it just that the plaintiff should no longer be allowed to obtain specific performance. But except the fact that the law is more vague and less capable of precise exposition, there is nothing to distinguish the power of the court to grant specific performance from its power to award damages. Again, take the case of granting injunctions, or attachment of a defendant's property or person before judgment. Nobody doubts that the court is tied down in these cases by the law as much as in the application of the merest cut and dry rules. But there are two classes of cases with reference to which it is often supposed that the court is at liberty to travel beyond the legal rights of the parties, determine which of the combatants before it is the more honest or the more virtuous, and give its decision for the better behaved disputant. We refer first, to the question of costs; secondly, to the question of the exercise by the High Court of its powers of revision.

With regard to 'costs': the law lays down that "the court shall have full power to give and apportion the costs of every application and suit in any matter it thinks fit" . . . . . .

"provided that if the court directs that the costs of any application or suit shall not follow the event, the court shall state its reasons in writing." This is deemed practically to give absolute power to the courts in the matter of costs, and if it is displeased with the successful party for any reason or considers the unsuccessful party deserving of sympathy on any ground, the costs are made not to follow the event. Suppose, for instance, the defendant who succeeds has given false evidence on any material point or produced a false document in support of his claim. This is considered sufficient to deprive him of his costs, or again, if the plaintiff's claim is perfectly valid in law, but the judge considers it an unkind claim or an improper one according to the accepted code of morality, or if the defendant's defence is perfectly good in law but not according to ethics, such as the plea of limitation, or an objection to the form of the suit, the party having the law on his side is considered not entitled to costs. In fact, the award of costs against a party is considered as the infliction of a punishment on him. In reality, of course the right to costs is based on the right to compensation for damage suffered by the conduct of an opponent in unlawfully withholding a legal right, or unlawfully launching a suit to enforce an untrue or unsuitable claim. In other words, it is compensation for the loss sustained in conducting the litigation which loss is unlawfully caused by the other side when the claim or the defence of the opponent is found to be untenable. Hence the rule that, ordinarily, the costs should follow the event, for, the event shows *primâ facie* that the successful party was right in his claim or defence and his antagonist was wrong in putting him to the expense of establishing it in court. Does it not then follow that he should not be deprived of his costs except when the litigation was unnecessary or when in consequence of false contentions raised by him, he put his opponent to unnecessary expense, so that on a fair assessment of the costs which each side is entitled to get from the other, it would be proper not to make an award in favour of either side? When a plaintiff establishes a portion of his claim, but fails to prove his right to the remainder, the proper course ordinarily would be to award to him the costs on the part with respect to which he has succeeded and to make him pay the costs on the part to which his claim has been found untenable. But it may be found that even with regard to what he succeeded in proving, a great portion of the costs was unnecessarily

incurred or that he made the defendant incur unnecessary costs, and it may be right in such cases to disallow costs altogether. But the matter for investigation always should be not whether either party has acted properly or improperly from a moral point of view, but who has the law on his side, and who was the cause of the costs being incurred improperly. If any party has given false evidence, the criminal law can make him suffer for it. We have emphasised this, because the true principle is often completely overlooked even by judges. In *Kalee Pershad Shaha* v. *Ram Pershad Shaha,* 18 W. R., p. 14, *Kemp* and *Glover,* J.J., held that the successful plaintiff was not entitled to costs because he had acted with malice and malevolence. The true principle was laid down in *Huxley* v. *West London Extension Railway Company,* L. R., 14 A. C. p. 26, which was a case under order LXV Rule 1. The rule enacts that "where any action, cause or matter is tried with a jury, the costs shall follow the event unless the judge by whom such action, cause, matter or issue is tried, or the court shall *for good cause* otherwise order. The question was what was good cause within the meaning of the rule. *Lord Halsbury,* the Lord Chancellor observed, "Whatever may be involved in that discretion, I cannot entertain a doubt that everything which increases the litigation and the costs, and which places upon the defendant a burden which he ought not to bear in the course of that litigation is perfectly good cause for depriving the plaintiff of his costs." *Lord Watson* said, "But I do not think that any and every reason which may be assigned for disallowing the costs of a successful party must necessarily be accepted as 'good cause' within the meaning of the rule. I shall not attempt a complete definition of what is meant by these words. They at all events embrace in my opinion everything for which the party is responsible connected with the institution or conduct of the suit and calculated to occasion unnecessary litigation and expense. So long as the judge or court deals with considerations of *that* kind, the sufficiency or insufficiency of these considerations as affording a reason for disallowing costs are matters of which they are constituted sole arbiters." Mark again the exposition of the rule by *Lord Bramwell*: "Now this is not a case in which there were costs of issues—that is to say, no issue was framed for the defendants that I know of; that is no specific determinate issue, but a great many of the things

which the plaintiff affirmed were found for the defendants. There is, however, no rule under which the learned judge who tried the case could say 'the defendants shall get the costs that they have been put to by unfounded allegations and statements and attempts at proof and the plaintiff shall get the costs of those upon which he has succeeded.' But the rule by giving discretion to the judge has enabled him to do substantial justice so that while he could not say 'I will apportion the costs according to the actual findings,' he could still say, 'the plaintiff shall get more and I quite agree as I have said with my noble and learned friend opposite, that if ever there was a case in which there was good cause, this is such a case according to the opinion which the noble and learned Lord who tried the case had of it.' In *Wilmott v. Barber*, 17 Ch. D., 772, the principle has been tersely indicated by *Jessel M. R.* "The Judge has a large discretion as to costs. He may make the defendant pay the costs of some of the issues in which he failed, although he may have succeeded on the whole action. Or he may say that both parties are wrong, but that he could not apportion the blame in a definite proportion and, therefore, would dismiss the claim without costs." It is quite clear from these extracts the question of costs is one entirely between the parties; the matter for determination is, which of the litigating parties is in the right with regard to the merits of the case; he is entitled to his costs unless he occasioned unnecessary costs to his opponent by raising untrue or untenable contentions. When such is the case the court will if possible apportion the costs, and if it cannot, it will make such order as on the whole appears to be just. But improper conduct in the course of the litigation should not affect the right of a party to costs unless such conduct has occasioned unnecessary costs to the opponent.

We now proceed to make a few observations on the second question—namely, the exercise by the High Court of its powers of revision either under S. 622 of the Code of Civil Procedure or under S. 25 of the Provincial Small Cause Courts' Act. The latter section lays down that "the High Court for the purpose of satisfying itself that a decree or order made in any case decided by a Court of Small Causes was according to law, *may* call for the case and pass such order with respect thereto as it thinks fit." The word used is no doubt, 'may' and the jurisdiction is discre-

tionary. The object is that the High Court should satisfy itself that a particular decree or order is in accordance with *law*. Suppose a party to a suit points out to the High Court that a decree is manifestly erroneous in law. Can it refuse to interfere? A mere error of procedure or any other irregularity not affecting the merits of the case would be no ground for invoking the Court's interference on the principle embodied in S. 578 of the Code of Civil Procedure and S. 167 of the Evidence Act. But suppose it is an undoubted error of *substantive* law. Can the Court say that it will not interfere, because it thinks the party asking for its aid has a very unjust case. Suppose for instance a Court of Small Causes wrongly holds that the plaintiff's claim is not barred by limitation, is it a ground for non-interference that the plea of limitation is an improper and unjust one? We submit not. The court is bound to interfere when there is an error of law. It has no discretion where the decision is erroneous according to the *substance of* the law, and the mistake is not one merely of form or procedure. The word *may* is used only to show that mere formal or unsubstantial errors are not a ground for revision. One would think there could be no doubt on the point since the Legislature has expressly declared that the object of the provision is to enable the court to see that the decision is in accordance with *law*. But though there is no reported ruling on the subject, the Madras High Court has repeatedly refused to exercise its power under the section, on the ground that the claim or the defence is extortionate or unjust, or because in its opinion the finding of the lower Court on the facts was also wrong, and there has, therefore, been a compensation of errors. We cannot but respectfully protest against this refusal of the judges to administer the law in order to advance what they regard as the moral justice of the particular case. Suppose, for instance—we are putting an actual case—the High Court refuses to interfere with the decision of a judge who refuses to award interest at the rate agreed upon between the parties on the ground that it is usurious, what would be the result? What is there to prevent all Small Cause Courts from deliberately refusing to administer the law of contracts with regard to interest, or to allow defendants to escape the performance of their obligations by pleading the statute of limitations, or in fact from refusing to give effect to any law which they regard as unjust? So long as their notions of justice agree with that of the High Court, is the law to be set at nought? Is there then to be one law for Small Causes, and another for regular

causes? No one, we believe, would advocate this. But this is not the only evil of judges trying to administer their own justice instead of the justice of the law When a judge sets himself to find out the *justice* of a case, he ends by discovering and enforcing one phase of it only and thereby often perpetrating great injustice, as very often all the facts necessary to elucidate the whole truth of a case are not placed before the court: indeed the court itself shuts out a great deal on the ground that it is not relevant. Then again, the attempt to discover truth behind the law is often made by a revisional tribunal very hurriedly and results in failure. Moreover, any hesitancy in enforcing the law is likely to promote unnecessary litigation by encouraging parties to put forward untenable contentions in the hope that what they regard as the truth of the case may be allowed to triumph over the harshness of the law. We think, there can be no more manly or safer course than to unflinchingly give effect to the law and to leave it to the Legislature to improve it when it needs alteration. No judge is concerned with substantial justice except according to the law. The responsibility for the law is not on the judge, but if he undertake to discover the truth beyond the extent that the law enables him to do, then it seems to us he is undertaking an awful responsibility full of danger with nothing certain to guide him.

TRANSLATED FROM THE VIVADARATNAKARA.

CHAPTER XVI.

Division among different kinds of sons.

Manu says "But where, after the daughter had been appointed to raise offspring, a son is born, the division in that case shall be equal; for there is no right of primogeniture for women."(1) *Commentary*—'Son' means '*aurasa* son.' The word '*Anu*' means 'after the appointment of the daughter.' 'Woman,' *i.e.*, the appointed daughter has been declared by Manu in the chapter on the nature of sons in the texts beginning with '*Aputronena*.'

Brihaspati says "One alone, namely, the *aurasa* son is declared to be the owner of the father's wealth. An appointed daughter is proclaimed equal to him; but other sons shall only be maintained."(2)

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(1) Manu, Chap. IX, 134. (2) Brihaspati, Chap. XXV, 35.

Manu says "One alone, the *aurasa* son, is the owner of the paternal wealth. Let him give to others maintenance out of charity."(1) *Commentary*—'Others' here refers to all those who are excluded from sharing in it. To them maintenance should be given out of charity.

The same author says, "Where a son is begotten by the younger brother upon the elder brother's wife, the division shall be equal. This is settled law."(2) *Commentary*—Where a son is begotten upon the wife of the elder brother, undivided and sonless, by the younger authorized in this behalf, that son after the father's death, when dividing the wealth with his paternal uncle, his own procreator, takes an equal share; but not the additional share claimable on the seniority of his father. This is the meaning.

The same author gives the reason of the law in the following text:—"A substitute does not in law become equal to the principal; the father is the principal in procreation. He should therefore be given his share accordingly"(3) *Commentary*—'*Upasarjanam*' means 'secondary.' The *kshetraja* son cannot in law be equal to the primary or *aurasa* son. Therefore, according to Prakāsakāra the paternal uncle, the procreator, is the principal. Lakshmīdhara however says that the word '*upasarjana*' (secondary) is used for the noun *upasarjanatvam* (nature of being secondary). But in effect there is no difference. '*Dharmēna*' means 'according to law.'

The same author says "He who takes the wealth and the wife of the deceased brother shall, having begotten a son upon her for his brother, give him all his father's wealth."(4) *Commentary*—He who takes the wealth and the wife of his divided sonless, and deceased brother, shall, after begetting upon her a son according to the law of procreation, a *kshetraja* son, give to that son alone all his father's wealth and shall not out of avarice take his brother's wealth himself. This is the meaning.

The same author says "But if an *aurasa* and a *kshetraja* son claim property in the hands of the same person (their mother), each shall take what belonged to his father to the exclusion of the

(1) Manu, Chap. IX, 163. (2) Manu, Chap. IX, 120.
(3) Manu, Chap. IX, 121. (4) Manu, Chap. IX, 146.

other."(1) *Commentary*—The *kshetraja* here contemplated is one born of a person not authorized. 'What belonged to his father' means 'wealth given by his father to his mother for the procreation of offspring.' Others say without difficulty that each takes the wealth of him who was his father.

The same author says "To sons of different fathers, the allotment of shares is by the fathers. Each takes his own paternal wealth and none other."(2) *Commentary*—'Sons of different fathers' means 'sons begotten upon the same woman by different men.' When during treatment of diseases, or by friendship begun during treatment for diseases, a *kshetraja* son is born and an *aurasa* is born after removal of the malady by treatment, then is the *kshetraja* entitled to maintenance merely or a share? And if he is entitled to share, how is the division to be made?

On this point Manu says, "The *aurasa* making a partition with the *kshetraja* shall give the latter a sixth or a fifth share of the father's wealth."(3) *Commentary*—This alternative of giving a fifth or a sixth share has to be regulated, according as the *kshetraja* son is possessed of good qualities or otherwise.

So again Manu says, "The *aurasa* and the *kshetraja* sons are heirs to the paternal wealth. The other ten (kinds of sons) are in their order heirs to the property of men of the same *gotra*."(4). *Commentary*—The first half of the verse is a declaration of the rule already propounded. The other ten, the adopted son, etc., in their order, in default of those previously mentioned, are heirs to the wealth of the *gnatis*. So says Asahayacharya. 'Are heirs to the property' means 'take shares in the father's wealth.' This rule applies, in the absence of the *aurasa*, to the appointed daughter and the *kshetraja* son.

Vasishtha regarding the son says, "If when he is taken, an *aurasa* son is born, he takes a fourth share if the wealth had not been spent in auspicious ceremonies."(5) *Commentary*—'When he is taken' means 'when a son not *aurasa* is accepted as such.'

(1) Manu, Chap. IX, 191.
(2) Not found in the Institutes of Manu in the S. B. E. Series.
(3) Manu, Chap. IX, 164.
(4) Manu, Chap. IX, 165.
(5) Vasishtha, Chap. XV, 9 and 10.

'*Yadisyath*' means 'if there be much wealth.' '*Auspicious* ceremonies,' such as sacrifices, etc.

Katyayana says: "If an *aurasa* son is born, other sons born of wives equal in caste shall take a third share; but if born of wives unequal in caste, they receive only food and raiment."(1) *Commentary*—The meaning is that where an *aurasa* son is born, the adopted son and the rest, if born of wives equal in caste, take a third share. Here to the son taken a fourth share was previously ordained; but by this text, a third share is ordained. This inequality should be construed in the light of the possession of bad or good qualities by the son. From this text it also follows that the injunction to give maintenance laid down by Manu in the text beginning with '*Seshānām*' applies to the sons born of wives unequal in caste.

On this point, Brihaspati says: "The *kshetraja* and other sons take one-fifth, one-sixth and one-seventh shares."(2) *Commentary*—The meaning is that the *kshetraja*, the *kanina* and the *paunarbhava* sons take a fifth, a sixth and a seventh share respectively.

Hārīta says: "When the property is divided, let a twenty-first share be given to a *kanina* son; a twentieth to a *paunarbhava*; a nineteenth to the *amushyayana*; an eighteenth to a *kshetraja*; a seventeenth to the son of an appointed daughter and the rest to the *aurasa* son."(3) *Commentary*—'*Amushyayana*' means 'the son of concealed birth.' '*Itaran*' means 'the remaining sixteen shares.'

Brahma Purana says: "The *aurasa* son, though the last born, shall enjoy the whole estate. The *kshetraja* son shall enjoy a third of the estate; and a son of an appointed daughter, a fourth. The adopted son takes a fifth; the son of concealed birth, a sixth; the son rejected, a seventh; the son of a maiden, an eighth; the son of a pregnant bride, a ninth; the son bought, a tenth; the son by a twice-married woman, the next share (the eleventh); the son self-given, a twelfth; the son by a Sudra woman takes for his share, a thirteenth of the paternal wealth."(4) *Commentary*—The sixth share allowed by Brihaspati to the *kanina*, the twentieth share allowed by Harita to the same, and the eighth share allowed by

(1) Cole. Dig., Vol. II, 348, CCXVIII. (2) Brihaspati, Chap. XXV, 39.
(3) Cole. Dig., Vol. II, 349, CCXIX. (4) Cole. Dig., Vol. II, 344, CCCXVII.

this text to the same must be reconciled as referring to the *kanina* son according as he is excellent in good qualities, totally devoid of them or middling. The seventh share allowed by Brihaspati to a *paunarbhava*, the eleventh share allowed by the Brahma Purana to the same and the twentieth share allowed by Harita to the same must be reconciled as referring to the *paunarbhava* according as he is excellent in good qualities, middling or devoid altogether of them. So also in respect of the *kshetraja* son and the son of concealed birth. Here when the doubt is what any one of the thirteen kinds of sons gets from the father, the Brahma Purana solves it. The text of Harita speaks of the mode of division among six kinds of sons. The text of Sankha and Likhita also speaks of the mode of division among six kinds of sons, equal in caste, whose father is deceased. As regards them, the former applies where the other five are inferior in qualities to the *aurasa* and the latter where they are equal in good qualities to the *aurasa*.

Sankha and Likhita say: "To the eldest, an ass shall be given as an additional share. The whole wealth belongs in default of him to the *kshetraja* son and the son of the appointed daughter; in default of them also, to the next three; in default of these even, to the sons by wives equal in caste, not entitled to share." (1) *Commentary*—Even among sons not heirs, the next succeeding takes the wealth in default of the preceding kinds of sons.

Again the authors say: "The son rejected, the son of the pregnant bride, the son adopted, the son bought, the son by the Sudra wife and the son self-given are the six kinds of sons who are not heirs."(2) The injunctions of different sages allowing different shares to these must be reconciled as being allowed in consideration of their excellence in, total want of and possession of, good qualities.

Sankha and Likhita say: "The following is the rule of division among the six sons who are sharers—the *aurasa* son, the *kshetraja* son, the son of the appointed daughter, the son of a twice-married woman, the son of a maiden and the son of concealed birth are the six kinds of sons who are kinsmen and heirs and of the same *gotra* with the father and the paternal grandfather; they are *sapindas*

(1) Not found in Cole. Dig.

(2) Cole. Dig., Vol. II, 331, CLXXXVI.

and heirs to wealth. The wealth should be divided into ten shares; the father shall take two, the *aurasa* son, two; the *kshetraja* and the son of an appointed daughter together, three; and each of the rest, one."(1) *Commentary*—'*Vikalpah*' means 'determination of shares.' '*Bandhudayadah*' means 'sharers in *gotra, pinda* and water and wealth.' This is what is explained by '*pitrupitamahadinam,*' etc. The drift is this—"When the common property is divided into ten shares, two are declared to go to the father; two, to the *aurasa*; and one and a half each to the *kshetraja* and the son of the appointed daughter; one share each alone should be given to the son by the twice-married woman, to the son of the maiden and to the son of concealed birth. This is for maintenance; and this rule applies where one has all these six kinds of sons."

Gautama says: "The *aurasa* son, the *kshetraja* son, the adopted son, the son rejected, the son made, and the son of concealed birth are heirs. The son of the maiden, the son of the pregnant bride, the son of the twice-married woman, the son of the appointed daughter, the son self-given and the son bought are of the same *gotra*; and in default of the *aurasa* and the other sons, take a fourth share."(2) *Commentary*—'They are of the same *gotra*' means 'they are eligible for offering *pinda*, libations of water, etc., and doing other rites and are, therefore, so described.' The statement that the son of a maiden and the rest belong to the same *gotra* alone is made for the purpose of reminding that where there are any of the sons, *aurasa*, etc., they do not take a share. They take a fourth share, in default of the *aurasa* son and the rest and if their father is alive. If their father be not alive and there are no *aurasa* or other sons, they all certainly take the wealth. This fourth share is allowed them when they are possessed of good qualities. The text of Brahma Purana applies where they are devoid of good qualities. Thus there is no conflict. The recognition in the text of Sankha and Likhita of the *paunarbhava* and the *kanina* as heirs and the denial of their heirship in this text of Gautama should be reconciled as based upon the equality or inequality of castes; for Katyayana says that sons born of wives unequal in caste are entitled only to food and raiment. Similarly

(1) Cole. Dig., Vol. II, 331, CLXXXVI.

(2) Gautama, Chap. XXVIII, 32, 33 and 34.

the denial of Sankha and Likhita of heirship in the rejected son and the adopted son and the inclusion by Gautama of these among heirs should be understood to apply to different cases.

Having defined the *sahodha*, the *dattaka*, the *kreeta*, the *swayamupagata*, the *apaviddha* and the *sudraputra* and having the *aurasa* and other sons in view, Vasishtha says: "Where of the previously mentioned classes (*aurasa*, etc.,) no heir exists, these take his (the deceased's) wealth."(1)

Harita says: "Six kinds of sons are *bandhus* and heirs, viz., the son begotten by oneself upon one's own virtuous wife, the *kshetraja*, the son by a twice-married woman, the son of a maiden, the son of an appointed daughter and the son of concealed birth. The adopted son, the son bought, the son rejected, the son of the pregnant bride, the son self-given *and the son found* are neither *bandhus* nor heirs."(2) *Commentary*—They are *bandhus* and heirs, because they are of the same *gotra*. Lakshmidhara, however, says that they are called '*bandhudayadah*,' because they take the wealth of the *bandhus*. The drift, however, so far as the importance of the first six and the unimportance of the second six are concerned, is the same.

Manu says: "Of the twelve kinds of sons which a man may have according to Swayambhuva Manu, six are *bandhus* and heirs; and the other six, *bandhus* but not heirs. The *aurasa* son, the *kshetraja* son, the adopted son, the son made, the son of concealed birth and the son rejected, are the six who are *bandhus* and heirs. The son of the maiden, the son of the pregnant bride, the son bought, the son by a twice-married woman, the son self-given, the son by a Sudra woman, these six are not heirs but *bandhus*."(3)

Baudhayana says: "Sages declare as heirs the *aurasa* son, the son of the appointed daughter, the *kshetraja* son, the adopted son, the son made, the son of concealed birth and the son rejected. Sages declare as belonging to the same *gotra* with the father, the son of the maiden, the son of the pregnant bride, the son bought, the son by a twice-married woman, the son self-given and the son by a Sudra woman."(4)

(1) Vasishtha, Chap. XVII, 31. (2) Cole. Dig., Vol. II, 331, CLXXXVII.
(3) Manu, Chap. IX, 158, 159 and 360. (4) Baudhayana, II, 2, 3, 31, and 32.

Devala, speaking of the twelve other kinds of sons excluding the son by a Sudra woman, says: "These twelve kinds of sons, born of himself, of another and accidentally found are declared for the purpose of progeny. The first six of them are heirs to all kinsmen; and the rest, only to the father. There is also a preference in their superiority according to their order. All sons are declared heirs to one who has no *aurasa* son. Where there is the *aurasa* son, there is no superiority among these. Of these, sons born of wives equal in caste take a third share and the rest who are inferior in caste shall depend upon him, being provided with food and raiment."(1)

Vishnu having defined the *aurasa* son, the *kshetraja,* the son of the appointed daughter, the son by a twice-married woman, the son of a maiden, the son of concealed birth, the son of the pregnant bride, the adopted son, the son bought, the son self-given, the son rejected and the son of unknown birth, says: "Of these, the one preceding is superior to all succeeding. He alone takes the wealth and he shall support the rest."(2)

Narada says: "The *aurasa,* the *kshetraja,* the son of the appointed daughter, the son of the maiden, the son of concealed birth likewise, the son by a twice-married woman, the son rejected, the adopted son, the son bought, the son made, and the son self-given are the twelve kinds of sons declared. Of these, six are *bandhus* and heirs; and the other six are *bandhus* but not heirs. The one preceding is superior to all succeeding; and the one succeeding is inferior to all preceding. When the father is dead, these have claims upon his wealth in their order. In the absence of the superior, the inferior son takes it."(3)

Yajnavalkya having defined the *aurasa* son, the son of the appointed daughter, the *kshetraja* son, the son of the maiden, the son by a twice-married woman, the adopted son, the son bought, the son made, the son self-given, the son of the pregnant bride and the son rejected, says: "Of these, in the absence of all preceding, the next in order gives the *pinda* and takes the wealth."(4) *Commentary*—These texts according to one of

(1) Cole. Dig., Vol. II, 332, CXC.
(2) Vishnu, Chap. XV, 28, 29 and 30.
(3) Narada, Chap. XIII, 45, 46, 47 and 49.
(4) Yajnavalkya, Chap. II, 132.

which a particular kind of son is declared to be both a *bandhu* and an heir and according to another of which the same person is declared neither a *bandhu* nor an heir, should be reconciled as having reference to the possession of good qualities and the want of them, as the case may be, of that kind of son. And the change of order in the enumeration of the different kinds as affecting their relative superiority must also be understood as based upon the possession of good qualities by the prior-mentioned and the want of them by the subsequent kind of sons. Similarly, in other matters also, the texts must be reconciled on the same line of reasoning.

Manu says: "Not the brothers, not the parents but the sons are declared heirs."(1)

Again he says: "In the absence of the superior kind of sons, the inferior shall take the wealth. Where there are many sons equal, they all share the wealth."(2) *Commentary*—'Equal' either in the possession of good qualities or in the incidents thereof.

Sankha and Likhita says: "In the absence of the superior kind of son, the inferior takes the wealth."(3) *Commentary*—'In the absence of,' etc., means 'in default of the *aurasa* son, etc.' 'Inferior son' means '*kshetraja*, etc."

Brihaspati says: "The adopted son, the son rejected, the son bought, the son made, the son by a Sudra woman likewise; these are declared middling sons, if pure in caste and deed. The *kshetraja* son is held in contempt by virtuous men; so also the son by a twice-married woman, the son of a maiden, the son of the pregnant bride and the son of concealed birth."(4)

Hārīta says: "The son by a Sudra woman, the son self-given, the son bought; all these are Sudra sons and are without doubt *khandaprishthah*. He who abandons his own family and goes into another undoubtedly becomes a *khandaprishthah* by that bad conduct. He who is made a son in distress, he who is self-given and the son of a Sudra woman, all these have been declared by Manu

(1) Manu, Chap. IX, 185.
(2) Manu, Chap. IX, 184.
(3) Not found in Cole. Dig.
(4) Brihaspati, Chap. XXV, 41.

to be *khandaprishthah.*"(1) *Commentary*—'*Vaishnavi*' means 'a Sudra woman.'

Here ends the chapter on "Partition among different kinds of sons."

CHAPTER XVII.

On the Aurasa Son.

Vasishtha says: "Twelve kinds of sons only are recognized by the Puranas. A son begotten by one's self upon one's legally wedded wife is the first called *aurasa.*"(2)

Vishnu says: "Now, there are twelve kinds of sons. One begotten by a man upon his own wife is the eldest."(3)

Manu says: "The son begotten by one upon his own legally wedded wife is known as the *aurasa* son, the first in rank."(4)

Devala says: "The son begotten by one upon his own legally wedded wife is called the *aurasa* son chiefly sustaining the father's lineage."(5)

Yājnavalkya says: "The son of the body is one produced by a lawfully wedded wife."(6)

Āpastamba says: "The sons of men who approach in due season their wives equal in class, legally married, and not previously married to another are concerned with religious rites and shall never be excluded from inheritance."(7) *Commentary*—'*Apūrvam*' means 'who had not had another husband and who had not been so much as betrothed to another.' This is Prakāsakāra's view. '*Sastra Vihitam*' means 'married according to the injunctions in the Sastras.' 'Religious rites,' *i.e.*, agnihotra, etc. '*Dāyenavyathikramah*' means 'they shall have all the heritable wealth.'

Baudhāyana says: "The son begotten by a man upon his wife equal in class and legally married should be known as the *aurasa* son. They quote the following verse: 'He proceeds from the

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(1) Not found in Cole. Dig.
(2) Vasishtha, Chap. XVII, 12 and 13.
(3) Vishnu, Chap. XV, 1 and 2.
(4) Manu, Chap. IX, 166.
(5) Cole. Dig., Vol. II, 334, CXCV.
(6) Yajnāvalkya, Chap. 11, 128.
(7) Apastamba, II, 6, 13, 1 and 2.

several limbs of the body. Thou art born of the heart. Thyself, become thy son. Live a hundred years.' "(1) *Commentary*—'Equal in class,' *i.e.*, the twiceborn to the twiceborn, the Sudra to the Sudra, and not Brahmin to Brahmin, Kshatriya to Kshatriya; for otherwise the son of the Kshatriya woman legally married by the Brahmin will not be included among the twelve kinds of sons. So says Pārijāta.

Sankha and Likhita say: 'Let a Brahmin take the hand of a woman equal in class; the bodies of his forefathers are born again of her; let him figuratively address his own soul in the person of his son. So it is said 'He proceeds from the several limbs, etc.,' " Ancestors seize the infant fetus produced from blood. Thou, my soul, art born again that thou mayest here sleep in body. For the benefits conferred on parents, thou, my soul, art called son; because thou deliverest them from hell called *Put* thou art called *putra* (son)."(2)

Here ends the chapter on 'The *aurasa* son.'

S. SITARAMA SASTRI.

NOTES OF INDIAN CASES.

The Maharaja of Bhartpur *v.* Kachera, I. L. R., 19 A., 510. The question was whether an independent prince could sue in British India by a recognized agent other than one appointed under S. 472. We must confess that the decision of the learned Judges is rather against the grammatical interpretation of the section. It may be, however, difficult to suggest a reason why a person appointed under S. 432 should be the only kind of recognized agent entitled to sue.

Ghazi *v.* Sukru, I. L. R., 19 A., 515. In an article by Mr. P. S. Sivaswami Aiyar in 1 M. L. J., on *Venkatacharyalu* v. *Rangacharyalu*, I. L. R., 14 M., 316, the reasoning on which that decision was based was strongly criticised. The Allahabad Judges in this case have followed that decision. We have nothing to add to the very cogent arguments advanced in that article questioning the correctness of the *ratio decidendi* in *Venkatacharyalu* v. *Rangacharyalu*. Except upon the ground that a gift by the lawful guardian is not a necessary pre-requisite of a valid marriage, it appears to us difficult to support the decision. To talk of

(1) Baudhayana, II, 2, 3, 14.

(2) Cole. Dig., Vol. II, 334, CXCVII, 335, CXCVIII.

the mother as *a* legal guardian, when *the* legal guardian is somebody else, appears to us erroneous. It cannot make any distinction, whether the giver in marriage would in certain contingencies be competent to fill the roll of guardian or that under no circumstances, he may have that competency.

Imam Khan *v.* **Ayub Khan,** I. L. R., 19 A., 517. We are unable to regard this decision as a correct exposition of explanation ii to S. 13 of the Code of Civil Procedure. A person having sued to recover property as owner and failed, sued again for possession of the property as mortgagee. *Knox* and *Burkitt*, J.J., dismissed the suit on the ground that the plaintiff might and ought to have made this a ground of action in the former suit. S. 13 refers to a person litigating under the same title; and explanation ii does not take away the force of this qualification in the section. And the title as mortgagee is distinct from the title as owner. Even giving the decision of the Privy Council in *Kameswar Pershad* v. *Rajkumari Ruttun Kœr*, 19 I. A., 234, the fullest scope, it is difficult to suppose that the plaintiff *ought* to have made the claim as mortgagee a ground of attack in the former suit. It would certainly have been embarrassing to the plaintiff, first to adduce evidence that he was the owner, and next that somebody else was the owner and gave him a good title under a mortgage.

Mahabir Prasad *v.* **Sital Singh,** I. L. R., 19 A., 520. It is always a question of difficulty to construe a provision of the Transfer of Property Act. After a preliminary decree in a suit for sale upon a mortgage is passed and the time provided for payment has expired, the order absolute for sale or final decree is directed to be made. It stands to reason that an application for execution within 3 years from the date of the order absolute is within time. The difficulty, however, arises with regard to the application for the order absolute. Is that an application for execution? It was held to be so in *Mahomed* v. *Ganapati*, I. L. R., 13 A., 278. If that be so, and such an application presupposes the existence of a decree, the subsequent application for sale must be within 3 years of this application. If the application for an order absolute is an application for execution, does it come under Art. 178 or 179? If until the order absolute is made the suit is regarded as a pending suit, then neither of the articles can apply. And the result of this will be that an application for the order absolute may be made at any time after the date of the conditional decree. The whole confusion is the result of importing the English rules relating to mortgages and mortgage decrees without a study of the Civil Procedure of this country and a careful attempt to make the one fit in with the other.

Dip Narain Singh *v.* **Hira Singh**, I. L. R., 19 A., 527. The first of two mortgagees obtains a mortgage decree without joining the second as a party, and purchases the property himself. The second mortgagee who was not impleaded is of course entitled to redeem. The question is what must he pay. Is it the amount of the mortgage calculated with interest up to the date of redemption or the amount of the purchase-money, or whichever is the larger of the two sums. Treating the second mortgage as outstanding, it is clear that in the first mortgagee have merged his interest as first mortgagee and the equity of redemption after the second mortgage. He is, therefore, entitled to be paid the amount of the mortgage up to the date of sale If the purchase-money is larger than that amount, although he may not be entitled to it as mortgagee, he will have an outstanding interest as purchaser in respect of the difference of the two amounts.

Modhu Sudan Singh *v.* **Rooke**, I. L. R., 25 C., 1. This decision of the Privy Council is of very considerable importance. The rule is laid down by the Privy Council that an alienation by a Hindu widow without justifiable necessity is only voidable, and not void. This sounds rather a startling announcement. The decisions have hitherto proceeded upon the ground that if justifiable necessity could not be shown, the alienation was void altogether; and the provision of the Limitation Act providing 12 years for a suit by a reversioner to recover property alienated by a widow appears to be based upon the view that the alienation is void. If it was only voidable, it follows, as a matter of course, that where the alienation is the grant of a lease the acceptance of rent by the reversioner is sufficient ratification of the act of the widow.

Aga Mahomed Jaffer Bindanim *v.* **Koolsom Beebee**, I. L. R., 25 C., 9. This is a valuable decision of the Privy Council dealing with several questions of Mahomedan Law. The Privy Council has held that the transfer of deposit receipts of a bank is not sufficient to constitute a gift. It would not be a sufficient *donatio mortis causa* under the English Law. A commission of 3 per cent. payable to the executor was held not to be a debt, but only a legacy to come out of the one-third disposable by will by a Mahomedan. Their Lordships also held that a Mahomedan widow is not entitled to maintenance. That she is not entitled if governed by the Shia law to a share in the value of land forming the site of buildings has been decided in several cases and has been reaffirmed by the Privy Council.

Shama Churn Mitter *v.* **Wooma Churn Haldar**, I. L. R., 25 C. 36. *Bannerji* and *Stevens*, J.J., lay down the salutary principle that

a notice to quit is not bad, because of some error in the statement of the area of the land. It would be a great advantage if a similar principle were extended to a tender of a pattah, under the Rent Recovery Act of this Presidency. An error, however small, is regarded as sufficient to vitiate the tender, and when after the error is pointed out a fresh pattah is tendered, it becomes generally too late for the fasli, and the non-tender of a correct pattah within the fasli is fatal to an action for rent. We thought Mr. Bhashyam Aiyangar's Bill would remedy this serious defect, but we have heard nothing of it since Mr. Crole's memorable speech last year.

Ram Narain Joshy *v.* Parmeswar Narain Mahta, I. L. R., 25 C. 39. It is rather hard, though we have no doubt it is correct law, that where a suit is instituted or an appeal presented in a Court which has no jurisdiction and it is transferred to a tribunal which would have jurisdiction if the suit or appeal was first presented to it, that it should be dismissed for want of jurisdiction. It would be well if a provision were introduced in the Suits Valuation Act or a proviso to S. 25, C. P. C., to cure the defect. The rule of law is more especially hard, because the provisions according to which the value for the purpose of jurisdiction has to be determined are not always simple and intelligible.

Ram Narain Singh *v.* Mina Koery, I. L. R., 25 C. 46. The court of higher grade is the court authorized to sell under S. 285, C. P. C., where two courts attach the same property. But if the court of inferior grade sells without objection or having overruled it, the purchaser gets a good title notwithstanding. This seems to us the only proper interpretation of S. 285. To give it wider scope would be to defeat justice. See however I. L. R., 22 B. 88.

Gour Mohun Gouli *v.* Dino Nath Karmokar, I. L. R., 25 C. 49. This was a suit by a person professing to be the real owner against a *benami* purchaser of a decree for a declaration that he alone was entitled to it. The benamidar had apparently attempted to execute the decree prior to the suit. The question whether a suit will lie at all in respect of a decree where the benamidar had been allowed to execute the decree was the subject of decision in *Sethurayar* v. *Shunmugam Pillai*, 7. M. L. J., 279. There is no doubt some difficulty in permitting such a suit. If the plaintiff is given the declaration, he will have to apply to the executing court to be allowed to execute the decree. He cannot apply as the transferee of the benamidar. He applies as a real transferee from the original decree-holder. The Court having recognized somebody else in respect of the same transfer as entitled to execute is called upon

again to adjudicate in favor of another as the real transferee. But once a person is allowed to execute the decree as transferee, there is no procedure prescribed for taking him off the record except upon a transfer by him. By a fiction of law it may be, that the real transferee may be regarded as taking by operation of law from the benamidar just as the administrator may be supposed to take from the executor.

SUMMARY OF RECENT CASES.

Decree modified on appeal—Prior proceedings, use of.

Hazrat Amir Began, v. Nawab Mir Nurudin Husenkhan. In a suit for division of property, when a decree is modified on appeal so as to vary the shares of the parties, a fresh application for execution should be filed, the Court executing the decree being at liberty to make use of, as far as possible, all the prior proceedings taken in the execution matter :—*Bombay Printed Judgments.*

Adoption by Hindu widow of her brother's son.

Bai Nani v. Chunilal Jeshankar. The texts of Saunaka and Sakala expressly lay down among negative prohibitions, the cases of the daughter's son, the sister's son and the son of the mother's sister, as ineligible for adoption in the case of the three higher castes of Hindu society, but their scope cannot be enlarged by analogical reasoning so as to include the adoption by a woman of her brother's son among the prohibitions. All that is required is that marriage shall be possible between the person for whom the adoption is made and the natural mother of the adopted boy. When, therefore, the younger of two Hindu widows adopted her brother's son for the purpose of continuing the line of her husband, who could have contracted a valid marriage with the boy's natural mother: *Held*, that the widow acted under an implied authority from her husband and the adoption was valid. *Held* also, that it would be a very far fetched construction of the law which would permit the husband or the elder widow to make a valid adoption of the boy, while denying this same validity to the act of the younger widow solely because the boy's natural father happened to be her brother :—*Bombay Printed Judgments*

Narayan Ganesh Joshi v. Ramachandra Vishnu Joshi. Defendant entered into the management of a Hindu shrine and into possession of the Inam property thereto belonging, under a deed of gift

executed in his favour by his natural cousin the late manager, in pursuance of which the Collector transferred the khata of the Inam lands to him and the Kamat Adhikaris duly recognized the defendant as the manager of the shrine under them. Plaintiff, sister's son of the late manager and his nearest, *bandhu*, heir according to Hindu law, sought to recover possession of the management of the temple, and possession of its lands, and to oust the defendant.

Held that as plaintiff could give no evidence in support of his claim, except that he was sister's son of the late manager and had not proved that the management of the shrine was hereditary, or that an heir, such as he, was entitled to succeed to it, plaintiff had not shown a better title than defendant, and had not disproved the defendant's right to be considered the manager of the property, or established his own right to displace the defendant:—*Bombay Printed Judgments.*

S. 3 (4) *of the Indian Stamp Act,* I *of* 1879—*Penalty Amendment of decree.*

Adarji Dorabji Ghaswala *v.* Rajaram Jhurakhanlal Kalal.

A document described as a kararnama was executed by defendant in favour of plaintiff, whereby defendant agreed in consideration of plaintiff performing certain services for defendant which would eventuate in defendant obtaining from Government a remission of a portion of the price which he had paid to Government for a toddy contract in which he had suffered loss, to pay to plaintiff out of the sum that might be so remitted by Government, 3 annas on every rupee remitted. The document was stamped as an agreement with an 8-anna stamp though attested by a witness, and the amount remitted by Government was larger than that covered by the stamp, if the document was to be treated as a bond. In a suit to recover the amount due under the document, the Subordinate Judge admitted the so-called kararnama in evidence but refusing to receive the deficient stamp duty and penalty passed a decree for Rs. 100 only, the amount covered by the 8 annas stamp.

Held that the instrument sued on was a bond within the definition of that term in Section 3 (4) of the Indian Stamp Act, 1879.

Held also, Candy, J., dissenting:—that as the parties when the document was executed were evidently under a mistake, thinking it was a mere agreement and should be stamped as such, and under such mistake, stamped it with 8 annas which secures a sum of Rs. 100 only

though the document was intended to secure a far greater amount, that the Court of first instance should have treated the instrument as an insufficiently stamped instrument and allowed the deficient duty and penalty to be paid upon the same under the provisions of section 34 of the Indian Stamp Act, and that the High Court had power to do in appeal what the lower Court could have done, *viz*., allow the plaintiff to pay the deficient duty and penalty and decree to him three annas on every rupee remitted by Government:—*Bombay Printed Judgments.*

Absence of Pleader—Pleader instructing other pleaders to appear—Restoration of suit to file.

Balwantrao Ganesh Oze *v.* **The Secretary of State for India in Council.** A pleader being engaged in another Court instructed two other pleaders to appear for him before the District Court in a suit in which he was appointed pleader by the plaintiff. Though the pleaders appeared, the Court dismissed the suit for want of appearance of plaintiff or any one duly authorized in his behalf. The District Judge having rejected the plaintiff's application for the restoration of the suit, the High Court in appeal directed the suit to be restored to the file:—*Bombay Printed Judgments.*

Practice—Discovery—Bankers' Books Evidence Act, 1879.

Pollock v. Garle [1893, I. Ch., D. 1., C. A.]

The plaintiff agreed to purchase a certain number of shares belonging to the defendant in a particular company. The suit was to rescind the contract and for damages, the ground of action being that the defendant by various misrepresentations and in particular, by a false statement that the company had at the time of the contract a large balance in the hands of its bankers induced the plaintiff to enter into the contract. After filing the suit the plaintiff applied for and obtained an order for inspection of the bankers' books, such inspection being limited to shewing the balance of the company in the books of the bankers at the time of the contract. The defendant appealed and the appellate Court discharged the order. Their Lordships of the Court of Appeal held that S. 7 of the Bankers' Books Evidence Act, 1879, ought to be so construed as to be consistent with the principles of law relating to discovery and that courts ought to allow inspection of only such of the entries in a banker's account which is in form or in substance the account of a party to the litigation. So that when an account is the account of a

person who has nothing to do with the litigation in question, the court ought to look to the effect of such an order upon the interests of third parties and take care that the section is not made a means of oppression.

Married woman—Restraint on anticipation—Wife's position in English law with respect to her husband's creditors—44 and 45 Vict., Ch. 41, S. 39.

Paget v. **Paget** [1898, I. Ch., D. 47, per *Kekewich*, J.]

According to the law of England where a wife pays out of her separate estate the debts of her husband or for that purpose mortgages her separate estate, she is entitled to be exonerated from or indemnified by her husband if living or by his estate if he be dead, for in this respect she stands in the position of a surety to her husband. If, however, the separate estate of the wife is restrained from anticipation, the court has power to relieve her from the restraint under s. 39, 44 and 45 Vict., c. 41. The sole criterion in cases of applications for removal of restraint on anticipation is to see whether the wife's happiness will be seriously endangered by refusal or will be advanced by such order. But when the wife's life interest has been made available for raising money for payment of her husband's debts by means of relief from restraint on anticipation under the sanction of the court, the ordinary doctrine under which she is entitled to be indemnified will not be extended to such payments unless the order of the court itself contains any directions to that effect.

Liability of Government officials in their official capacity—Crown's prerogative—Amendment—Practice—Change of character of suit.

Raleigh v. **Goschen**, [1898, I. Ch., D. 73, per *Romer*, J.]

The plaintiff sued the defendants, who were the Lords Commissioners of Admiralty in their official capacity, for a declaration that the latter were not entitled to enter upon or acquire by compulsory purchase some lands of the plaintiff, for damages for alleged trespass and for injunction to restrain further trespass. *Romer*, J., held that the suit was unsustainable against the defendants in their official capacity and that leave to amend so as to describe the defendants as private individuals ought to be refused inasmuch as such an amendment would change the character of the suit.

The following general principles of law may be gathered from the judgment of *Romer*, J., in this case ;—

1. Except as provided by statute, no officer of Government is liable to be sued in his official capacity for anything done in his public character or employment.

2. Any person who commits a trespass cannot escape liability for the offence and cannot prevent himself being sued, merely because he acted in obedience to an order of the executive Government or of any officer of State.

3. If the trespass had been committed by any subordinate official by order of his superior, that superior official,—whatever his official position may be,—could be sued.

4. The head of a Government Department is not liable for the neglect or torts of officials in the Department, unless it can be shown that the act complained of was substantially the act of the head himself.

Will—Revocation by codicil—Principles, governing.

In re **Wilcock.**

Kay v. Dewhirst [1898, I. Ch. D. 95 *per Romer*, J.]

A testator bequeathed his personal estate to his two daughters absolutely and directed that each should be paid £1,000 on their respective days of marriage in addition to their shares of the personalty. By a subsequent codicil he directed that the provisions mentioned in his will with respect to the £1,000, be null and void, and as to the personal estate he directed that " instead of such bequests in the manner expressed in my said will to such daughters absolutely " his executors should convert the whole and stand possessed of the money in trust to pay one-half of the income to one daughter and the other half to the other daughter each for her separate use, and on the decease of either of the daughters to pay one-half of the trust moneys to such child or children of hers as she by deed or will may appoint, and in default of appointment to her children equally. The codicil made no provision as to what was to be done if either of the daughters died without children. The unexpected event happened and one of the daughters died childless leaving a will by which she disposed of her estate upon certain trusts. Under these circumstances, *Romer*, J., had to construe the effect of the codicil on

the will of the testator. Decided cases have established certain rules of construction on the question above stated.

1. Where you have a distinct disposition made by a will, that disposition cannot be revoked by a codicil except by words clear and distinct to that effect. (*Kellet* v. *Kellet*, L.R. 3, H. L. 167).

2. If a testator leave a legacy in absolute terms, but were afterwards to restrict its enjoyment to secure certain objects for the benefit of the legatee, then, upon failure of such objects, the gift absolute prevails (*Lassence* v. *Tierney*, 1 Mac. and G. 561.)

3. Where there is an absolute gift by will and then a codicil not merely modifying the mode of enjoyment by the legatee, but diminishing the estate originally given, then the absolute estate is in effect cut down.

Applying these principles to the facts of the case *Romer*, J., held that so far as the gift of £1,000 was concerned, the codicil revoked the will; and that in the event that had happened there was no intestacy as to the moiety of the personalty given to the daughter who died, as the codicil did not in effect revoke the will in that behalf.

Practice—Discovery—Penal Proceedings.

The Mayor, &c., of the County Borough of Derby v. Derbyshire County Council [1897, Appeal Cases, p. 550.]

S. 10 of the Rivers Pollution Prevention Act, 1876, makes it an offence to pollute river water and empowers a county court to make an order requiring any person to abstain from committing the offence and also to impose a penalty upon any person disobeying the order. The respondents, plaintiffs, sued the appellants, defendants, in the county court at Derby for an order under this section requiring the latter not allow sewage water to flow into the river Derwent. The plaintiffs then applied for an order of discovery of documents and delivery of interrogatories. The Judge made the order and that was confirmed by the Queen's Bench and by the Court of Appeal. The defendants appealed to the House of Lords. The chief objection of the defendants was that this was a penal proceeding and no discovery ought to have been allowed. The House confirmed the judgment of the Courts below. Lord Herschell who delivered the leading judgment of the House has clearly explained in his judgment those cases where a discovery is generally refused. There are two classes in which discovery is not allowed, *i.e.*, (1) a penal proceeding and (2) cases where the insisting on a discovery of facts may, when the discovery is made, subject the party to a penalty in

some other proceeding. The two classes of cases are distinct from each other and ought not to be confused. The former is either a proceeding to enforce a penalty or one of such a nature that it may—not necessarily must—result in a penalty. It is not enough if it merely lead to a step towards exposing to a penalty, as for instance, in the case on hand where the only order that could have been made was an order requiring the defendant to abstain from polluting the river which order if disobeyed would end in a penalty. The other class relates to the disclosure of particular facts or the giving of particular answers which if disclosed or given tend to expose a penalty. If a person takes objection on this ground, he must either show that the answers to particular questions if given in a particular way might or would subject to a penalty or when the questions are put he must take exception to answering them on that ground. In the particular case, however, the matter had not come to this stage as the appeal had been preferred upon the general order for discovery.

JOTTINGS AND CUTTINGS.

We beg to acknowledge with thanks the receipt of the following publications :—

The Lawrence Asylum Press Almanac for 1898 :—Price Rs. 6.

The Indian Penal Code, by R. A. Nelson, Bar.-at-Law, Second Edition, published by *Messrs. Srinivasa Varadachari & Co., Triplicane, Madras* :—Price Rs. 8.

The Elements of Mercantile Law, by T. M. Stevens, D.C.L., Bar.-at-Law, Second Edition, published by *Butterworth and Co., 7, Fleet Street, London* :—Price 10/6.

The Albany Law Journal for January (*in exchange*).
The Calcutta Weekly Notes for January (*in exchange*).
The Allahabad Weekly Notes for January (*in exchange*).
The Green Bag for January (*in exchange*).
The Canadian Law Times for January (*in exchange*).

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What Constitutes Champerty.—The Supreme Court of the United States has recently given a decision in *Peck* v. *Heurich*, 173 Sup. Ct. Rep. 927, upon the interesting point, not often raised, as to what constitutes champerty. In this case, the title to a piece of land was conveyed to the plaintiff as trustee; all costs of obtaining possession of it were to be borne by him; and in the event of its being obtained the trustee was to receive $33\frac{1}{3}$ per cent. of the proceeds " after paying all expenses, costs, and expenditures " out of his share. The decision of the court that this agreement is champertous seems plainly right. According to Black-

stone, 4 Commentaries, 124, and also the later cases, such as *Ry. Co.* v. *Brady*, 57 N. W. Rep. 767 (Neb.), *Land Co.* v. *City of Superior*, 67 N. W. Rep. 38 (Wis.), there are three elements necessary to constitute the offence. First, and this is common to all forms of maintenance, the absence of any other interest in the case on the part of the champertor than that arising from his champertous contract; second, the assumption by the champertor of all expenses in conducting the case; third, a previous agreement for his remuneration from the proceeds of the suit. The present case combines these three elements.

The general ground upon which the legal condemnation of champerty rested, and still rests, is that of public policy. It may be questioned, however, if the common law offence of champerty, as we know it to-day, whether regarded from an historical or from a practical point of view, deserves to be considered as a living part of the law. Historically, the nature of the offence, the evil against which the law is directed, have in large part changed. If the language of the statute of 1 Ed. III, c. 14, and of Hawkins, 1 C. P. 462, S. 38, is to be regarded, it seems that originally the taint of champerty was not due to any feeling that there was evil in the increase of law suits *per se*. It was owing to the fear that the purchasing and conducting of suits "by a great man of the realm" would have a "manifest tendency to oppression." To-day oppression, or illegal influencing of the courts, is out of the question, and the condemnation of champerty arises, as the tone of the case under discussion shows, from the feeling that it is undesirable for the courts to be annoyed by the multiplication of suits brought by persons with no interest of their own.

Admitting, however, that champerty, in its changed modern significance, is still objectionable, of what practical efficacy is the law of champerty as it stands to-day? Owing to the need of combining the three elements above mentioned, the question of whether or not an agreement is to be held champertous seems one of terminology. On the authority of this present case, a contract providing that an attorney is absolutely to receive 33⅓ per cent. of the gain resulting from the suit is champertous, provided the other two elements be present. An agreement which reads that the attorney shall receive a fee contingent on and proportioned to the amount recovered is free from this taint. *Ramsey* v. *Trent*, 10 B. Mon. (Ky.) 341; *Major* v. *Gibson*, 1 Patt. & H. 48. Such being the case, it would seem that, to an attorney bent upon carrying out an affair of this nature, the law in regard to champerty would prove no great obstacle:—*Harvard Law Review.*

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Damages—Liability for Gratuitous Medical Services.—In an action for personal injuries caused by defendant's negligence, *held*, that the plaintiff can recover for the value of the services of the doctors and nurses, and it is immaterial whether plaintiff will ever have to pay for such services. *Denver & Rio Grande R. R. Co.* v. *Lorentzen*, 79 Fed. Rep. 291.

If the true rule as to such damages is that plaintiff shall recover only for the expense to which he is actually put, this decision is wrong. This was the view taken by the court in *Pepperhorn* v. *Black River Falls*, 61 N. W. Rep. 79 (Wis.). But this is open to the objection that under such a rule the friends of the plaintiff would be treated as giving their services, not to the plaintiff, but to the wrongdoer. The proper view, and the one sustained by the weight of authority, would seem to be that these services have been necessitated by defendant's wrong, and the defendant should pay for them. The plaintiff is the proper person to be paid for them, since they were rendered for him. That they cost him nothing is immaterial. He recovers, not for their cost, but for their value. *Brosnan* v. *Sweetser*, 127 Ind. I.:—*Harvard Law Review.*

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Persons—Infancy—Estoppel.—In an action to foreclose a mortgage, *held* that the defendant was not estopped from denying his infancy, because he had falsely represented himself to be of age and thereby induced the plaintiff to make the contract. *New York Building Loan Banking Co.* v. *Fisher*, 45 N. Y. Supp. 795.

The case is undoubtedly supported by the weight of authority. Bigelow on Estoppel, 5th ed., 605; *Merriam* v. *Cunningham*, 11 Cush. 40; *Alvey* v. *Reed*, 114 Ind. 148; *Burley* v. *Russell*, 10 N. H. 184, accord. *Kilgore* v. *Jordan*, 17 Tex. 341, *contra*. In general, an estoppel would be raised wherever an action of deceit would lie; but even in jurisdictions where such an action against the infant is allowed, (*Fritts* v. *Hall*, 9 N. H. 441,) the courts have not gone so far as to allow the contract to be enforced. Their refusal is grounded upon public policy. The result is that because of the fraud the party should have a right to rescind the contract, and should then be left to an action of tort. 1 Story on Contracts, 5th ed., S. 111:—*Harvard Law Review.*

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Torts—Action for Mutilation of Dead Body.—*Held*, that the father of a child has such a right to its dead body that he may maintain an action against one who, without his consent, performed an autopsy on the dead body. *Burney* v. *Children's Hospital*, 47 N. E. Rep. 401 (Mass.);—*Harvard Law Review.*

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Duty of Carriers ;—In *Taylor* v. *Wabash R. Co.* a somewhat novel question in the law of negligence was raised. The plaintiff sued for damages incurred by reason of a severe illness, due to the cars of defendant, on which he was a passenger, being insufficiently warmed, on the theory that it is the duty of a railroad companyto provide its passengers, not with bare transportation only, but with a vehicle in which they will not be exposed to a temparature so severe as to injure their health. After the evidence was in, the Court instructed the Jury to return a verdict for the defendant. On appeal the Supreme Court, speaking through Mr. *Justice Barclay* said :

"By accepting plaintiff as a passenger upon the train, defendant became obliged to discharge some other duties towards him beyond that of mere safe carriage to the plaintiff's destination. The principles of the common law, as applied to the circumstances of travel at this day and in this country, require of the carrier of passengers by railroad a certain measure of attention which we believe the defendant in this action did not fully meet. To quote a recent writer on this topic: 'The duty of the carrier extends, not only to the furnishing of safe vehicles, but also to the supplying them with such accommodations as are reasonably necessary for the welfare and comfort of his passenger. This duty would undoubtedly include the supplying them with seats, if a day car or vehicle; with proper berths, if a sleeping car; with warmth in cold weather; with light at night," etc. In the case at hand defendant was notified of the plaintiff's suffering from want of proper or insufficient heat in the car. Notwithstanding such notice, repeatedly given, defendant omitted to comply with the demands of its duty, although it appears from the evidence that the train made many stops at stations along the route. Defendant, it may fairly be inferred, had ample opportunity to supply the needed heat, had it seen fit. Such, at least, is the showing of fact which plaintiff makes; and the truth of it he is entitled to have submitted to the proper triers of the facts. The plaintiff's case is not founded on any claim for mere discomfort on his journey. It is founded on the theory that he ultimately suffered a severe illness and impairment of his ability to work, as a direct consequence of the cold he contracted on the ride with defendant of which he complains. His testimony tends to sustain that theory; and he was, we think, entitled to go to the jury upon it":—*The Albany Law Journal.*

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We take the liberty of extracting the following article from the Albany Law Journal, as it cannot fail to be of interest to a great many of our readers.

Lawyers and Politics.

Should lawyers engage in politics? Before this question can be intelligently answered it is necessary that it be more clearly defined. I presume it goes without saying that lawyers should discharge in politics the obligations resting upon all good citizens. Under our form of government every qualified citizen owes certain duties to the government, and he is recreant to his trust if he seeks to evade this responsibility. It is his duty to endeavor to make the laws under which he lives as perfect as possible to suggest changes and make alterations in them. It is his duty to ferret out crime, and to see that the violators of law suffer the penalties imposed upon them It is his duty to see that the laws are framed so as to shield the innocent and punish the guilty. It is his duty to endeavour to fill the offices with the most competent officials. It is his duty to take an interest in public affairs, to discuss important issues, and to exert his influence in behalf of purity in politics and a wise, just and economical administration of law. To this extent lawyers, in common with all other good citizens, have their political duties to perform. And I think it is safe to go even farther, and assert that the lawyer, by reason of his very profession, should take a more active part in politics than the average citizen. His very vocation opens out before him peculiar opportunities for doing his country political service. In the study and practice of the law he has an opportunity for detecting its defects and suggesting improvements in its form and administration. In his business dealings with all classes and conditions of people he learns who, among those who are candidates for the suffrages of the people, are the most worthy. In representing clients, both in the courts and out of them, he gains their confidence, and thus is enabled to shape their conduct not only in business matters, but in politics also. The duty which a lawyer owes, then, as a citizen, demands of him that he take an interest and part in politics up to a certain point. Nor has he a right to shirk this responsibility. For him to do so because he will be subjected to criticism, lose some clients, make enemies, alienate friends, curtail his profits and injure his popularity, is to act an unworthy and cowardly part. By abstaining from politics entirely he will have more time for his profession, more time to devote to study, more time to consult his clients and discharge his other professional duties. But he has no right to look at it from this selfish standpoint. He owes to

society certain duties, and should endeavour to perform them even at a personal sacrifice of time, leisure and money. Nor should a lawyer refuse to render professional service in the line of political duty. Criminals must be prosecuted no matter how high they may stand in politics. It is a great temptation, at times, to avoid duties of this kind. It is often extremely disagreeable to prosecute those who occupy a prominent place in the political walks of life. In discharging duties of this nature, lawyers often incur the lasting enmity of clients who can pay good fees. By going forward and manfully performing his duty, a lawyer may find himself a target for criticism, an object of abuse and a subject of calumny on the part of every mean and base slanderer. But it matters not how severe the trial; it matters not how disagreeable the task, in matters of this kind every true lawyer will bravely face the danger and fearlessly discharge the duty incumbent upon him.

And now I have brushed away some preliminaries, and I have removed from this discussion certain aspects of my subject about which the great majority of the legal profession, and the public generally, I believe, are agreed.

Should lawyers engage in politics? If they wish to rise to professional eminence, if they wish to make a name for themselves, if they wish to make money, if they wish to be successful in their day and generation—is it wise for them, to use a common, but forcible, expression, to dabble much in politics? Is it wise for them to run for office, to spend much of their time among the people endeavoring to win popularity and public applause—in other words, to devote more time and attention than their duties as citizens impose upon them, to getting into the good graces of the people? Or, to put the question more sharply still, if a lawyer wishes to rise to eminence at the bar, should he devote himself exclusively to his profession, not meddling at all in politics? I dare say the consensus of opinion of the most able and successful lawyers would favor answering this question in the negative. Prof. John B. Minor, who was a professor of law in Virginia's far-famed university, and who as a teacher and expounder of the law, was perhaps unsurpassed on this continent, in lecturing to his classes, strenuously advocated a divorce between the law and politics, and urged upon young men the importance of devoting themselves assiduously and exclusively to their profession. That the law is a jealous mistress is an expression which has so often been repeated as to have become axiomatic. "The profession of the law," says Mr. Ritso, "is that, of all others, which imposes the most extensive obligations upon those who have had the confidence to make choice of it; and, indeed, there is no

other path of life in which the unassumed superiority of individual merit is more conspicuously distinguished according to the respective abilities of the parties. The laurels that grow within these precincts are to be gathered with no vulgar hands; they resist the unhallowed grasp, like the golden branch with which the hero of the Æneid threw upon the adamantine gates that led to Elysium.

It stands to reason that the lawyer who gives all of his time to his profession must, in the long run, outstrip his competitor who divides his time between law and politics. While the latter is out among the people hunting up votes, the former is pouring over the pages of the law. If a lawyer devotes himself, as he should do, to his profession, he has no time for anything else. Every mail brings letters to be answered, every day brings clients whose cases must be looked after, and every court brings cases to be argued. He must be familiar with the fundamental principles of the common and statute law. He must have mastered Blackstone, Kent, Story, Smith's Mercantile Law and Adams'. Equity. He must be familiar with the changes made in the statute law of his own State, and he must know by heart its Constitution. He must keep up with the reports of his own State, and must be pretty familiar with a number of those of other States, and especially with those of the Supreme Court of the United States. And then there are a thousand office duties to be performed. Certainly a lawyer has no time to spare for matters outside of his profession.

The experience of the most successful lawyers proves the same thing. As a general rule, lawyers who have given their energies to their profession have succeeded, while many of those who have attempted to unite law and politics have failed in both. Many a bright young lawyer becoming disgusted with the common-place routine work of his profession, and fretting because he does not at once receive that recognition which he feels that his talents merit, launches out upon the tempestuous sea of politics, only to be stranded upon its rocks. There are two reasons which demand of lawyers now more than ever before this intense devotion to their professional work. In the first place, competition is sharper now than it has ever been. I do not mean simply that the bar is crowded, for that has almost invariably been the case. What I refer to more particularly is this; Formerly lawyers were accustomed to gather around them a line of clients who were attached to them not only professionally, but personally, and who could be depended upon through thick and thin. To a considerable extent this has been changed. Clients do not generally now remain as steadfast and loyal as was once the case. A man may be one attorney's client

to-day, and to-morrow another's. In the rapid press of business and the spirited competition of the times clients will not wait. If they call at the law office and find that the attorney whom they want is out, they will often at once go elsewhere and form a new relationship. If their business interests demand it, they have no compunctions at all in changing from one attorney to another. In the second place, the law in many respects has taken on a business character. In the law offices we find the telephone, a stenographer and typewriter, an office boy, and many other conveniences. Letters must receive immediate attention. Correspondents cannot afford to wait for answers to their letters, and will not do so. Executions and sentences of the court must sometimes be stayed by telegram. One day a lawyer must attend the State court, and on the next he must appear before the United States, District or Circuit Court. At one hour he may be in his own office, advising his clients; at the next he may be in the court-room arguing some intricate case, and the third hour may find him in the consultation room of some attorney in another city many miles distant.

This new attitude which the profession is fast assuming demands of an attorney the rigid application of business rules and regulations, and it is getting to be more and more prohibitive of outside work, it matters not whether it may be "the charms of a light literature" or the fascinations of a political life.

But it may be answered, he may form a partnership and in this way relieve himself from the demands of office work, and, to some extent, of duties in the court-room. While, in a measure, this may alleviate matters, yet it by no means accomplishes all that may be desired. Oftentimes clients call to see if they can obtain the services of a particular member, and, finding that one out, they go elsewhere. Besides it is often the case that one member of a partnership is better qualified for doing a special kind of work than another, and it would be surprising if this were not so.

Of course there are exceptions to all rules. In some individual cases it may be well to mix a little politics with your professional work. I do not think it will hurt a lawyer in the rural districts, especially if he has a partner, to be a member of the legislature. He will not lose a great deal of time from his office. He will widen his acquaintance with the people; he will become acquainted with the prominent men of his State; he will keep up with changes in the laws, and where the legislatures elect judges he will stand a better chance for promotion to the bench. And then there are positions in public life, such as solicitor and

attorney-general, which are in the line of his profession, and which, in place of retarding, will often help him in his professional work, if he can secure them.

And now let us look at this question as we see it exemplified before us. Practically we see lawyers in office on every hand. We find a great many of them in the State legislatures. We find them in the various county offices, in the executive offices of many of the States, and, in fact, we find them filling almost every variety of office in the gift of the people. In the house of representatives and in the senate of the United States we find a long roll of attorneys. Nor is it generally a matter of surprise when we learn that the successful candidate for the presidency is a member of the legal profession. Were you to ask them why they had gone into politics, the answers would be as varied as they would be interesting. Some of them would tell you that politics was more congenial to their tastes than the friction of the court-room and the dry pages of the law. Some would tell you that they were ambitious and liked to hear their praises sung by the multitude. Others, again, would tell you that they got tired waiting for clients to come, and sought public office rather than starve. And others still would tell you that they had engaged in politics against both their inclination and their judgment, because they thought that they were bound to obey the voice of the people. I venture to assert that the great majority of them would say that they regretted ever entering politics; and yet the probability would be that, if it were possible to be done over, they would do the very same thing again. Lawyers have to consult their own peculiar qualifications and tastes. They have to take into consideration their peculiar circumstances and environments. I have no idea that entering politics was a mistake on the part of Clay, Calhoun or Webster. Calhoun was only at the bar for a few years and no doubt acted wisely in selecting a wider field. Clay was a successful lawyer, politician and statesman, even though he failed to reach the goal of his ambition—the presidency. Webster was a great lawyer and a great statesman. For a man with the diversified talents which he possessed to tie himself down to one profession would be a grievous mistake. Abraham Lincoln, Stephen A. Douglas and Daniel W. Voorhees were all successful lawyers as well as politicians. In the cultivated and distinguished Carolinian, Hugh S. Legare, we find the qualities of a lawyer, politician and statesman happily combined. I have no doubt that Judah P. Benjamin, who was a distinguished member of the Confederate cabinet and an ornament first of the American and afterwards of the English bar, would have egregiously erred had he in his own case

divorced politics from the law. Nor have I any doubt that the eloquent statesmen and great Georgia lawyers, Hill, Toombs and Stephens, were inspired to a happy choice when they united politics and the law.

Nor do I believe that either of our ex-presidents, Harrison or Cleveland, made a mistake in entering politics. After a lawyer has attained eminence at the bar, and has secured a comfortable estate, I think it is both wise and commendable in him to branch out into the wider field of politics and statesmanship ;—*The Albany Law Journal.*

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Good Advice to Law Graduates.

The following very excellent advice was given by the Hon. Isaac Newton Phillips, in an address to the law graduates of the Illinois Wesleyan University, at Bloomington: "Don't take life too seriously. Don't go about wearing a countenance of a dyspeptic owl. Cultivate a sense and appreciation of humor, but don't, oh! don't set up as a professional humorist. It is one of the chief compensations of a practice at the bar that the nervous strain and drudgery are frequently relieved by bursts of humorous light between the shadows. Ludicrous situations arise in the progress of litigation, and if you have not the sense of humor to enjoy them, you will miss that which has in it more solace than large retainers. What a 'balm of hurt minds' is a little innocent fun! Our great president, Abraham Lincoln, preserved his mental health in the terrible ordeal of the war by indulging his exquisite sense of the ridiculous. I would not have you descend into undignified frivolity, by any means : but there is a false dignity as well as a true one, and you may set it down that one who always wears a grave, solemn and forbidding countenance is carrying around a very large supply of stupidity under the guise of what he supposes to be dignity. A saving sense of humor is a monitor to good taste and propriety, and keeps us out of many errors and follies. When you are done with the work of the day, lock your office door and go home a free man. Don't carry your law-suits about with you for the entertainment of your friends. Never 'talk shop,' even in your own home. Nothing is more intolerable than the lawyer who can talk in society of nothing but 'his quillets, his cases, his tenures, and his tricks,' unless it is the doctor who persists in telling you whose head is just now ringing with his latest dose of quinine.

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"It is a laudable ambition in each of you to desire to become a successful lawyer. That you may abundantly succeed is my sincere

prayer; but I would not have you forget that there are far greater and better things than to be even the most successful lawyer—greater and better things than any riches or worldly honors which may follow professional success. To be true to your convictions, and live always in the good company of your own self-respect, is more than the winning of law suits or the taking of cities. Riches and worldly honors cannot alone make you happy. Though you voyage with Sinbad to the Valley of Diamonds, and though you chafe the lantern of magic with Aladdin until the genii of thrift come and build you palaces in a night, there must still remain a great want in your soul if this be all you have to carry with you down the other side of the hill of life, for when your hair is silvered, and your step uncertain—when your voice can no longer instruct courts or enthral juries—you will recur fondly to those greener spots on memory's waste which signalize the helpful hand and the loving deed, and then the memory of one tear of gratitude on the cheek of the widow or the orphan whose patrimony you have saved without reward will be to you far more than forensic victories or palaces of gold" :—*The Albany Law Journal.*